## CHAP. XIV.

*Concerning the* office of a juſtice, *when a perſon charged or ſuſpected of* felony *is* brought before him.

WHEN a party thus arreſted for felony is brought to the juſtice of peace, he muſt either diſcharge, or commit, or bail him.

But preparatory to theſe acts there are ſome things, that are required of him before he do either.

1. By the ſtatute of 1 & 2 *P. & M. cap.* 13. and 2 & 3 *P. & M. cap.* 10. he is to take the informations upon oath of the proſecutor and witneſſes and put them into writing; and he is likewiſe to take the examination of the perſon accuſed, but this is to be without oath and put into writing.

And theſe examinations and informations he is afterwards to deliver into the general ſeſſions of the peace or to the gaol-delivery, as the caſe ſhall require; and becauſe it may be unſeaſonable to take theſe informations or examinations preſently, or poſſibly it may take longer time, the priſoner may be continued in the cuſtody of the officer, or may be detained in the juſtice's houſe, or committed to ſome near ſafe place of cuſtody, till the examinations can be taken.

But this muſt be diſpatched in ſome convenient time, and therefore, *P.* 43 *Eliz. C. B. Scavage* and *Tateham (a)*, in [121] an action of falſe impriſonment brought by a perſon brought before the mayor of *Pomfret*, a juſtice of peace, upon ſuſpicion of felony, the defendant could not upon the account of examination juſtify the detaining him in the juſtice's houſe nineteen days; but it was held, that he might detain him three days upon that account.

2. It is fit to take a recognizance from the proſecutor to appear and prefer a bill of indictment, and alſo of the witneſſes to appear and give evidence at the next ſeſſions of the peace or gaol-delivery, as the caſe ſhall require, if he ſhall find cauſe to commit or bail the priſoner; otherwiſe it is, if he ſhall diſcharge him.

Theſe things being thus premiſed, as I ſaid, the priſoner is either to be diſcharged, or committed, or bailed.

(a) *Cro. Eliz.* 829. *Vide Part* I. *p.* 586.

I. Touching

I. Touching the diſcharge of a priſoner. If a priſoner be brought before a juſtice of peace expreſly charged with felony by the oath of a party, the juſtice cannot diſcharge him, but muſt bail or commit him.

If he be charged with ſuſpicion only of felony, yet if there be no felony at all proved to be committed, or if the fact charged as a felony be in truth no felony in point of law, the juſtice of peace may diſcharge him, as if a man be charged with felony for ſtealing of a parcel of the freehold, or for carrying away what was deliverd him, and ſuch like, for which tho there may be cauſe to bind him over as for a treſpaſs, the juſtice may diſcharge him as to felony, becauſe it is not felony, *Kelw. f.* 34. 44 *Aſſiz.* 12 *Poultor de Pace* 146. *b.* But if a man be kild by another, tho it be *per infortunium* or *ſe defendendo*, (which is not properly felony,) or in making an aſſault upon a miniſter of juſtice in execution of his office, (which is not at all felony,) yet the juſtice ought not to diſcharge him, for he muſt undergo his trial for it; and therefore he muſt be committed, or at leaſt bailed.

[122] II. As touching commitment or impriſonment of a party brought before a juſtice for felony, or ſuſpicion thereof, theſe things are to be obſerved:

1. The commitment muſt be by writing under the ſeal of the juſtice.

And therefore altho a juſtice may by word of mouth arreſt a perſon for a breach of the peace done in his preſence, yet in that caſe the commitment of him ought to be a *mittimus* under ſeal; thus it was reſolved in *Sandford*'s caſe (*), *P.* 23 *Car.* 1. *B. R.* but agreed he may detain him in his cuſtody, till a warrant can be made.

And herein the power of a juſtice differs from the power of a court; for the court of king's bench may commit by order, and ſo may the court of ſeſſions of the peace, becauſe there is or ought to be a record of the commitment.

Nay in chancery, if an order be made for commitment of a perſon, till he enter into bond, &c. the warden of the *Fleet* may impriſon the impriſonment by virtue of that order. *T.* 39 *Eliz. B. R.* 2 *Rol. Abr. p.* 559. *Taylor* and *Beal.*

(*) *Part* I. *p.* 612.

2. The

2. The *mittimus* ought to have theſe circumſtances. 1. It muſt contain the certainty of the cauſe, and therefore if it be for felony, it ought not to be generally *pro felonia*, but it muſt contain the eſpecial nature of the felony briefly, as *for felony for the death of J. S.* or *for burglary in breaking the houſe of J. S. &c.* and the reaſon is, becauſe it may appear to the judges of the king's bench upon an *habeas corpus*, whether it be felony or not (†): and likewiſe by the ſtatute of 3 *H.* 7. *cap.* 3. the ſheriff is to make a calendar of the priſoners in his gaol, and deliver it to the juſtice of gaol-delivery ſignifying the priſoners and their cauſes: *vide* 2 *Co. Inſtit.* 52 & 591. 2. It is fit to mention the name of the juſtice, and his authority in the beginning of the *mittimus*, tho this is not always neceſſary, for the ſeal and ſubſcription of the juſtice to the *mittimus* is ſufficient warrant to the gaoler: *vide ſupra* (**) & *Dalt.* 355 & 383. *(b)*, for it may be ſupplied by averment, that it was done by the juſtice. 3. It muſt have a certain date of the year and day (*). 4. It ſhould have an apt concluſion, namely to detain him till he be thence [123] deliverd by due courſe of law. 2 *Co. Inſtit. ubi ſupra* (†).

But altho it be true, that theſe things are regular and fit, namely the cauſe, the juſtice committing, the date, the apt concluſion, yet I am far from thinking the warrant void, that hath not all theſe circumſtances.

And therefore the juſtification in falſe impriſonment againſt the gaoler may be good by virtue of ſuch a warrant; and it ſeems to me, (contrary to the opinion of my lord *Coke*, *ubi ſupra*,) that if an eſcape be ſuffered willingly by the gaoler upon ſuch a general warrant, it will be felony in him: *vide quæ ſupra*, *cap.* 54. *Part* I. *p.* 609. *De frangentibus priſonam (c)*.

And therefore if the concluſion of the *mittimus* be to detain him till further order by the juſtice, it is true it is an unapt concluſion, and therefore binds not up the hands of the juſtices, to whom it may belong, to bail or deliver him, as the caſe ſhall require; but the commitment is notwithſtanding good, if there be any tolerable certainty in the body of the warrant for what it is, as for felony generally, tho the particular is beſt to be expreſſed.

(†) *Vide ſupra*, *p.* 111.
(**) *Part* I. *p.* 577.
*(b) New Edit. p.* 575 & 593.
(*) *Supra*, *p.* 111.
(†) *Vide Part* I. *p.* 584.
*(c)* See alſo *Part.* I. *p.* 595.

3. Regularly

3. Regularly the commitment is to be to the common gaol of the county, or if the offenſe be committed and the party taken within a franchiſe that hath a gaol, (as the *Gatehouſe* at *Weſtminſter*,) then to the gaol of the franchiſe, by the ſtatute of 5 *H.* 4. *cap.* 10.

Only ſometimes it hath been uſed by the juſtices of peace to ſend ſuch priſoners, which are bailable and have not their bail ready, to ſome private priſon, as the *New Priſon* in *Middleſex* for ſome ſhort time, till they can procure their bail: but this hath always been diſliked by the juſtices of the king's bench and gaol-delivery as inconvenient, and not agreeable to the law *(d)*.

4. If the priſoner be bailable, yet the juſtice is not bound to demand bail, but the priſoner is bound to tender it, otherwiſe the [124] juſtice may commit him; *quod vide* 14 *H.* 7. 10. *a. per Fineux*, accordingly adjudged *T.* 40 *Eliz. C. B. Collin*'s caſe; and ſo of a ſheriff, that hath taken a man by *capias*, where he is bailable.

Thus far touching commitment of an offender.

But in ſome caſes the offender is neither diſcharged nor committed, but bailed, and that comes next to be conſidered.

But becauſe the buſineſs of bail is large and various, I ſhall refer that to the next chapter.

Burn. Title Juſtices of the Peace.

*(d)* See the caſe of *Kendal* and *Roe*, *State Tr. Vol.* IV. *p.* 862. *& ſupra, Part* I. *p.* 585. *in notis.*

## CHAP. XV.

### *Concerning* bail *and* mainpriſe.

TOUCHING bailing of felons, *&c.* there will be theſe things inquirable. 1. What it is, and the nature and kinds of it. 2. In what caſes it may be, and in what not. 3. By whom *(a)*. 4. In what manner it is to be done, by writ or without writ *(b)*. 5. The penalty of erring therein *(c)*.

*(a) Infra, cap.* 16. *& ſub fine cap.* 17.
*(b) Infra, cap.* 17.
*(c) Infra, ſub fine hujus capitis.*

Touching

Touching the *firſt*, namely the nature of bail.

Bail and mainpriſe are uſed promiſcuouſly oftentimes for the ſame thing, and indeed the words import much the ſame thing, for the former is *traditus J. S.* and the other is *manucaptus per J. S.*

But yet in a proper and legal ſenſe they differ. 1. Always mainpriſe is a recognizance in the ſum certain, but bail is not always ſo. 2. He, that is deliverd *per manucaptionem* only, is out of cuſtody; but he that is bailed, is in ſuppoſition of law ſtill in cuſtody, and the parties that take him to bail are in law his keepers, and may re-ſeize him to bring him *in*; and therefore if a man be let to mainpriſe, ſuppoſe in the king's bench, an appeal or other ſuit cannot be brought againſt him as *in cuſtodi mareſcalli*; but if he be let to bail, he is in ſuppoſition of law ſtill *in cuſtodiâ mareſcalli*, 33 *E.* 3. *Mainpriſe* 12. 36 *E.* 3. *Ibidem* 13. 32 *H.* 6. 4. *a. Protection* 13. and accordingly the books of 21 *H.* 7. 20. *b. per Fineux*, and [125] 9 *E.* 4. 2. *a.* that ſeem to differ, are to be underſtood. 3. Tho ſometimes the recognizances themſelves both in bail and mainpriſe are in ſums certain, as ſhall be ſhewn, yet the entry on record in the one caſe is *deliberatur per manucaptionem*, and in the other caſe *traditur in ballium*.

But now for the kinds of bail properly ſo called, it is of theſe kinds.

1. Sometimes it is in no ſum certain at all, but *traditur in ballium* to *J. S.* and this is the uſual form in all bails in civil actions in the king's bench; and antiently it was ſo alſo in criminal caſes, tho now, as ſhall be ſhewn, it differs.

And of this kind was the antient form of that bail, which was *corpus pro corpore*, which now is rarely uſed in that form, and the reaſon why that is diſuſed is, becauſe there was antiently a looſe opinion, that he, who was bail in this manner for a felon, was to be hanged, if he brought not in the principal to keep his day, 33 *E.* 3. *Mainpriſe* 12. but the truth is, all his puniſhment is to be fined for his default. *Crompt. Juſtice. f.* 157. *a.* 11 *H.* 6. 31. *b.*

And ſo in civil actions, where this kind of bail is ſometimes in uſe, as appears 27 *H.* 8. 11 & 12. 21 *H.* 7. 20. *b.* the bail is amerced, if he have not the principal at the day.

2. Sometimes the bail is only a recognizance in a ſum certain for the appearance of a felon, and this is uſual, *viz.* the principal in double the ſum; as for inſtance in 40*l.* or more, the ſureties each

of

of them in 20*l.* a-piece *ad comparendum & ſtandum recto in curiâ de latrocinio prædicto ſecundùm legem, &c. Dalt. cap.* 114. *p.* 305. *(a)*.

The ſureties ought to be at leaſt two men of ability, and their number and ſufficiency and the ſum of the recognizance is much in the diſcretion of him that is to take it, and therefore he may examine them upon oath; but how theſe are puniſhable that take inſufficient bail, ſhall be ſaid hereafter.

[126] The ſureties *ad ſtandum juri* doth import alſo, that he ſhall plead to the felony; and therefore before the ſtatute of *Marlbridge, cap.* 28. *(b)*, if the felon had ſtood upon his *privilegium clericale* and would not anſwer the felony, his bail had been amerced, which is remedied by that ſtatute.

3. The third ſort of bail is that, which is indeed the true and regular bail, which is not only a recognizance in a ſum certain, but alſo a taking to bail, the true form whereof is contained in *Lambert's Juſtice, Lib.* I. *cap.* 23. *p.* 264. *Memorand' quod die, anno, &c. coram, &c. venerunt* A. & B. *& ceperunt in ballium* J. S. *captum & detentum pro ſuſpicione cujuſdam feloniæ uſquæ proximam generalem gaolæ deliberationem in comitatu prædicto tenend', & aſſumpſerunt, viz. quilibet eorum ſub pœna* 20*l. de bonis & catallis, terris & tenementis eorum & cujuſlibet eorum ad opus dicti domini regis levand', ſi prædictus* J. S. *ad eandem proximam gaolæ deliberationem non perſonaliter comparebit coram juſticiariis dicti domini regis ad dictam gaolam deliberand' aſſignatis ad reſpondendum dicto domino regi tunc & ibidem ſuper præmiſſis,* or *ſuper iis, quæ ad tunc & ibidem ipſi objicientur,* or rather according to the antient form *ad ſtandum recto de latrocinio prædicto ſecundùm legem & conſuetudinem regni* Angliæ. *Dat. ſub ſigillis noſtris, die, anno, &c. Vide F. N. B.* 250. *Crompt.* 157. *b.*

But the ſeal need not be, for he is a judge of record, only his hand ſimply ſubſcribed, or ſubſcribed *capt. & cognitus die & anno ſupradicto coram* Math. Hale.

This is the form of a bail, where the principal is either an infant or in priſon, and ſo abſent; and thereupon a warrant iſſues under the hand and ſeal of him that takes the bail for his enlargement, called a *liberate.*

But if he be bailed by a juſtice of peace before commitment, or if committed and brought into the court of king's bench or ſeſſions to

*(a) New Edit. cap.* 166. *p.* 150. *(b) 2 Co. Inſtit. p.* 150.

be

be bailed, then the party himſelf is alſo bound; and ſometimes the recognizance is ſimple with a condition added for his appearance, and ſometimes the condition is containd in the body of the recognizance, *ut ſupra:* Only it is to be remembred, that when any perſon is bailed for any miſdemeanor either upon the return of an *habeas corpus* or otherwiſe, the return or record ought to be [127] firſt filed, and a *Committitur mareſcallo* entred, and then bail taken; for all perſons, that are bailed in the king's bench, are *de facto*, or in ſuppoſition of law firſt ſuppoſed to be *in cuſtodiâ mareſcalli.*

The advantage of this kind of bail is this, that it is not only a recognizance in a ſum certain, but alſo a real bail, and they are his keepers, and may be puniſhed by fine beyond the ſum mentiond in the recognizance, if there be cauſe, and may re-ſeize the priſoner, if they doubt his eſcape, and bring him before the juſtice or court, and he ſhall be committed, and ſo the bail be diſcharged of his recognizance. 36 *E.* 3. *Mainpriſe* 13. 32 *E.* 3. *Mainpriſe* 23. *Crompt. Juſtice, f.* 157. *d*

Touching the *ſecond*, in what caſes a perſon is bailable, that is accuſed or indicted of felony or acceſſary, or in relation thereunto.

I ſhall not meddle with bailing of priſoners in civil actions or for offenſes leſs than felony by acts of parliament, only thus much.

Regularly in all offenſes either againſt the common law or acts of parliament, that are below felony, the offender is bailable, unleſs, 1. He hath had judgment. 2. Or that by ſome particular or ſpecial act of parliament bail is ouſted.

What acts of parliament ouſt bail in particular offenſes againſt thoſe acts is not my purpoſe to declare, they are very well collected by Mr. *Dalton, cap.* 114. *(c)*, and Mr. *Crompton de pace regis, f.* 154. *b. & ſequentibus.*

In relation to capital offenſes there are eſpecially theſe acts of parliament, that are the common land-marks touching offenſes bailable or not bailable, *viz.* 3 *E.* 1. or *Weſtm.* 1. *cap.* 15. 34 *E.* 3. *cap.* 1. 23 *H.* 6. *cap.* 10. 1 *R.* 3. *cap.* 3. 3 *H.* 7. *cap.* 1. 1 & 2 *P. & M. cap.* 13. and 2 & 3 *P. & M. cap.* 10.

As to the ſtatute of 3 *E.* 1. it declares, who are bailable and who not as well in other caſes, as in caſes capital.

*(c) New Edit. cap.* 166. *p.* 553.

But

But at that time few were concerned in bailing of priſoners, but the ſheriff, in whoſe cuſtody they moſt commonly were, and ſuch ſubordinate officers, that either under the ſheriff or as bailiffs of liberties had the cuſtody of priſoners, [as appears from the words of the ſtatute,] *Et pur ceo qùe viſcounts & autres queux ont priſe & ret. hus priſoners:* And therefore ſtill the ſtatute did not extend to courts of juſtice, much leſs to the court of king's bench: *vide 2 Co. Inſtit. p.* 185, 186. *ſuper hoc ſtatutum*; neither doth this ſtatute ſingly of itſelf extend to juſtices of the peace, for they were not in being till 1 *E.* 3. and therefore the ſtatute of 1 & 2 *P.* & *M. cap.* 13. eſpecially makes this ſtatute of 3 *E.* 1. a direction touching bailing of offenders.

And therefore it ſeems alſo upon the ſame reaſon the ſtatute of 27 *E.* 1. *cap.* 3. *de finibus levatis*, that directs and authorizeth juſtices of gaol-delivery to inquire of ſheriffs and others, that have let out of priſon by replevying perſons not repleviſable, or have offended againſt the ſtatute of *Weſtminſter*, and to puniſh them according to that ſtatute, extends not to courts or juſtices of the peace, but only to ſheriffs and ſubordinate officers.

And the truth is, it could not be well applicable to any but them, for as all writs of *homine replegiando*, *de manucaptione*, & *de odio & atiâ* were directed to the ſheriffs, ſo in moſt caſes what was to be done in thoſe times for bailing of priſoners was moſt commonly to be done by the ſheriff.

This ſtatute declares, 1. Who were not bailable by the common law. 2. Who from thenceforth ſhould not be bailable; and 3. Who ſhould be bailable, and inflicts puniſhment upon ſheriffs and bailiffs bailing thoſe that are not repleviſable, and not bailing thoſe that are repleviſable.

And this act extends not only to ſuch bailments as might be *virtute officii*, but alſo to bailments by force of the common writ *de homine replegiando* or *de manucaptione*; whereof hereafter.

My lord *Coke* in his comment upon this chapter *(d)* hath given us the ſubſtance and intent of this ſtatute, which I ſhall therefore but in effect tranſcribe.

[129] I. As to thoſe that were irrepleviſable at common law, I mean before the ſtatute of 3 *E.* 1. (for poſſibly more anticently all offenders were repleviſable), they are of four ſorts.

1. *For the death of a man.*

*(d)* 2 *Co. Inſtit. p.* 186, *& ſeq.*

At

At this time there was held little difference between murder and manſlaughter, but only in degree; for till 23 *H.* 8. clergy was allowable in the one as well as in the other, nay, at this day, if the indictment run only *interfecit & murdravit* without *ex malitiâ præcogitatâ*, the priſoner hath clergy.

And as to the point of *bail* no difference was at common law, nor after the ſtatute of 3 *E.* 1. till later ſtatutes *(de quibus infra)*, between murder, manſlaughter, or the killing of a man *ſe defendendo*, or *per infortunium*, for they, that could not bail in murder, regularly could not bail in the other three caſes.

And this held univerſally as to bailment by the ſheriff or by the juſtices of peace; but as to others, it had ſome exceptions.

The court of king's bench might and ſtill may bail in any caſe whatſoever, even in high treaſon or murder, for the court is held in law *coram ipſo rege*. 4 *Co. Inſtit. p.* 71. 2 *Co. Inſtit. p.* 186. but this is in the diſcretion of the court, and none can challenge it *de jure*.

And this bailment in the king's bench may be upon an original indictment before them in the county where they ſit, or upon an indictment removed by *certiorari*, or upon a priſoner removed by *habeas corpus* before or after an indictment taken; *vide infra*.

In ſome caſes juſtices of gaol-delivery may bail in caſe of the death of a man.

1. If a man be found guilty of a death *ſe defendendo*, or *per infortunium* upon his trial, the juſtices of gaol-delivery may certify the matter into *chancery*, that the party may ſue his pardon of courſe, and in the mean time bail him till the next ſeſſions. 3 *E.* 3. *Coron.* 361.

And the ſame law it is, if the coroner's inqueſt only find it *ſe defendendo*, ſuch inquiſition ſhewing the ſpecial matter, as it ought, is good, *Stamf. P. C. cap.* 7. *f.* 15. *b.* 26 *Eliz. Holmes*'s caſe, *Crompt. de pace*, *f.* 153. *b.* & 28. *a.* and the reaſon of the book of 12 *E.* 3. cited by *Crompton*, that in an indictment before the coroner *ſe defendendo*, the words *ſe defendendo* were void and ſtricken out, is not becauſe they were againſt the king, but becauſe they were too general. [130]

2 *Co. Inſtit. ſuper ſtat. Glouc. cap.* 9. *p.* 316. an indictment *ſe defendendo* is good before juſtices of gaol-delivery, but it is there ſaid it is not good before juſtices of peace; *de quo ſupra*, *p.* 45. and therefore upon ſuch an indictment before the coroner *ſe defendendo* ſpecially, the juſtices of gaol-delivery may bail the party till the next ſeſſions to

procure his pardon of courſe, as well as if it had been found upon his trial; and ſo it was done 26 *Eliz.* in *Holmes*'s caſe, *Crompt.* 153. *b.* *vide Ap-Rice*'s caſe, 19 *H.* 7. *Kelw.* 53. *a.* *Crompt. ibidem.*

2. If a man be convicted of manſlaughter, and hath a pardon to plead, which the juſtices of gaol-delivery ſee in the interval of the ſeſſion, they may bail him, (notwithſtanding his conviction and that of manſlaughter), to another ſeſſion to plead his pardon. 2 *E.* 6. *B. Mainpriſe* 94. *Crompt.* 153 *b.*

3. If a perſon be brought before the judges of gaol-delivery upon ſuſpicion of murder, but before commitment or indictment [it appears] upon examination of the fact by the juſtices of gaol-delivery, that he is not guilty, (tho in truth a felony were committed), the juſtices of gaol-delivery may bail him to another ſeſſions: *vide* 31 *Eliz. in caſe de Salford, Crompt.* 154. *a.*

But I am not of the mind that the ſame judge [*Shuttleworth*] was of that if he be convict upon a trial againſt the opinion of the judge, that he can bail him to ſue his pardon; but all he may do is to reprieve him before judgment, and certify for him for a pardon.

And therefore it ſeems to me there is no difference between this caſe and that of *Dyer* 179. *a.* where a man is convict, and it [131] is doubted whether he be within clergy, yet he remaineth not bailable.

4. If a man be indicted of murder at the ſeſſions of gaol-delivery, and prays his trial, but the proſecutor for the king is not ready with all his evidence, the judge may reſpite his trial till another ſeſſions; and tho he be not bound to bail him, yet if he do find that it is no contrivance of the priſoner to ſurpriſe the proſecutor, but that it is merely the neglect of the proſecutor, or that his pretenſe is merely a delay to continue the party in priſon, I have known it often practiſed at *Newgate*, and elſewhere, for the juſtices of gaol-delivery to bail the priſoner till another ſeſſions, if it be far off, and upon circumſtances conſidered.

And yet in none of theſe caſes neither juſtices of peace nor ſheriff can bail; but how far they may bail in caſes of manſlaughter ſhall be ſaid hereafter, when we conſider the ſubſequent ſtatutes.

And thus far at preſent for bailing in caſe of the death of a man.

2. The *ſecond* caſe where a man was not bailable by the common law, is, where a man is taken *per mandatum domini regis*: this is not intended of the perſonal command of the king, for regularly as the king

king cannot in perſon arreſt or impriſon, ſo he cannot command another to impriſon, but it muſt be done by ſome order, writ, or precept, or proceſs of ſome of his courts. 16 *H.* 6. *Monſtrauns de fait* 182. 1 *H.* 7. 4. *b.* 2 *Co. Inſtit. ſuper ſtatutum Weſtminſt.* 1 *cap.* 15. *p.* 187.

Nay altho ſuch a mandate be by commiſſion under the great ſeal, it is void, 42 *Aſſiz.* 5. therefore the *præceptum*, or *mandatum domini regis* in this act, is intended of the proceſs of law iſſuing out of the king's courts according to their ſeveral juriſdictions, 2 *Co. Inſtit. ſuper Mag. Chart. cap.* 29. and *Weſtm.* 1. *cap.* 15. But if intended of the king's perſonal command, tho ſuch a perſon ſo taken be not bailable by the common writ *de homine replegiando*, yet he is bailable by the court of king's bench or chancery upon an *habeas corpus*; *de quo infra*, 2 *Co. Inſtit. p.* 55. 187.

3. *Thirdly*, *Or of the juſtices*, *viz.* by writ of proceſs iſſuing according to law within their ſeveral juriſdictions; [132] for altho theſe were bailable in many caſes by the courts that iſſued the proceſs, yet they were not bailable by the common writ *de homine replegiando*, but are excepted therein, nor by the ſheriff *virtute officii* till the ſtatute of 23 *H.* 6. *cap.* 10.

4. *Fourthly*, *Or for the Foreſt*; perſons impriſoned by the juſtice in *eyre* in the foreſt, are not repleviſable by the common writ *de homine replegiando*.

II. The ſecond part of this ſtatute is enacting or declarative who are not bailable; but ſo far as this ſtatute looks, it only concerns the ſheriff and bailiffs, and the common writs of *homine replegiando*, or *de manucaptione*, which are directed to the ſheriff, tho afterwards it was made the rule in many things to juſtices of peace, &c. by the ſtatutes of 1 & 2 *P.* & *M.* and 2 & 3 *P.* & *M. de quibus infra.*

And the caſes wherein bail is reſtrained by this ſtatute, are thirteen in number, ſome in reſpect of the heinouſneſs and weight of the offenſe, as treaſon, burning of houſes, breaking of priſon, &c. and the reſt upon the great evidence and probability of guilt, as perſons outlawed, &c. but I ſhall follow them in the order that the ſtatute ſets them down.

1. Perſons outlawed; for outlawry is an attainder of felony, and [the outlaw] is preſumed guilty, becauſe he withdraws himſelf from the proceſs of law.

And upon the ſame reaſon it is, that a perſon convict of felony, while the judge adviſeth upon his clergy, is not bailable, becauſe he is

convicted, *Dy.* 179. *a.* Nay, tho he be convicted againſt the direction of the court, he is not bailable againſt the opinion of *Shuttleworth*, 31 *Eliz. Crompt. f.* 154. *a.*

And therefore if the ordinary had had a clerk convict in his cuſtody, if the ordinary let him to bail, he was puniſhable: *vide* 15 *H.* 7. 3. *a.*

But if a man be outlawed for felony, and be taken upon a *capias utlegatum*, and plead in avoidance of the outlawry againſt him that he is of another place, and ſo not the perſon outlawed, or bring a writ of error to reverſe the outlawry and aſſign his errors, the court [133] of king's bench may bail him; and it is not unuſual ſo to do, whether the outlawry be upon an appeal or an indictment.

If a man be indicted or appealed for ſuch an offence, wherein bail may be taken, the indictment or appeal does not hinder his bailment, becauſe it induceth no ſufficient preſumption of his guil; if he were bailable before indictment, he is bailable after, 2 *Co. Inſtit. ſuper ſtat. Weſtm.* 1. *cap.* 15. and *ſtatutum ipſum F. N. B.* 249. 22 *Aſſiz.* 94. but not allowed till he hath pleaded to the indictment, 16 *Aſſiz.* 11. 29 *Aſſiz.* 44.

But if a man be indicted before juſtices of a higher juriſdiction, as before juſtices of *oyer* and *terminer*, he cannot be bailed by juſtices of peace, for they cannot proceed upon an indictment taken before ſuperior judges, tho otherwiſe the cauſe might be within their cognizance.

2. Perſons that have abjured for felony, are not bailable, for they are attainted in law.

3. Approvers in felony are not bailable, becauſe they do confeſs themſelves guilty.

4. Perſons taken with the *mainouvre* are not bailable, becauſe it is *furtum manifeſtum*.

But that is intended of the thief himſelf; for if *A.* ſteal goods, and ſells them to *B.* and *B.* is taken with them, *B.* is bailable.

5. Perſons that being committed for felony break priſon, are not to be bailed; for, 1. It carries a preſumption of their guilt. 2. It is a ſuperadded felony to the former, for which they ſtood committed.

6. Notorious thieves: and herein common fame, and other circumſtances may be oppoſed againſt their bailing, unleſs they can ſhew reaſonable evidence to prove their innocence. 16 *E.* 4. 5. *a. b.*

7. Perſons impeached and approved by an approver, becauſe it induceth a ſtrong ſuſpicion that they are guilty, becauſe the accuſer confeſſeth himſelf guilty before he can impeach others. But

But this hath certain exceptions. 1. If the approver be dead. 2. If the approver hath waved his appeal. 3. If the perſon accuſed by the approver be of good fame.

8. Perſons arreſted for wilful burning of another man's houſe, which was a felony at common law.

9. Perſons arreſted for falſifying the king's coin.

10. Or for counterfeiting the king's great or privy ſeal.

11. He that is excommunicated by the ordinary, is not bailable, unleſs it be for a temporal cauſe; and then upon a prohibition granted, he may not only be bailed but delivered; or upon an appeal and a ſpecial writ *de cautione admittendâ*, if not obeyed by the ordinary, a ſpecial writ may iſſue for his enlargement.

12. Or if he be impriſoned for ſome open miſdeed, as if *A.* dangerouſly wounds *B.* he may be impriſoned till it be known whether the party will die or live; and regularly is not to be bailed, till it ſhall probably appear that the danger is over. 10 *H.* 7. 20. *a.* 3. *H.* 7. *Tab.* 1.

13. Nor he that is arreſted for treaſon, that toucheth the king, whether he be indicted or not; theſe are neither bailable by virtue of the common writ *de homine replegiando*, nor *ex officio* by the ſheriff or bailiff of a liberty.

But all or any of theſe are bailable by the court of king's bench. 2 *Co. Inſtit.* 189.

III. The third thing provided by this ſtatute, is to declare who are bailable by the ſheriff, and they are of ſeven kinds.

1. Perſons indicted before the ſheriff for larceny, if they have not been accuſed of other felonies before, or as the writ of the regiſter, *f.* 83. *b.* 268. *b.* ſtyles them, if they are of good fame.

This therefore lies very much in the diſcretion and true information of the ſheriff, or other juſtices that commit them.

2. Perſons impriſoned for a light ſuſpicion, *dum tamen fuerint bonæ famæ.*

3. Perſons indicted for petit larceny.

4. Perſons accuſed for receiving of felons.

5. Or of commandment, force, or aid to the felony done.

Theſe two laſt concern acceſſaries *after* and *before*, wherein there is ſome diverſity of opinion in our books. [135]

Regularly in all caſes of felony, tho it be murder, the acceſſary is bailable till the principal be attaint, and this holds as well in caſes of

the death of a man as other felonies, 40 *E.* 3. 42. *a.* 40 *Aſſiz.* 8. But if the principal be once attaint, and then the acceſſary is taken, he ſhall not be bailed until he hath pleaded to the indictment; but after plea pleaded by him, he ſhall be bailed, notwithſtanding the attainder of the principal, tho it be in caſe of murder. 43 *E.* 3. 17. *b.* 50 *E.* 3. 15. *a.* 27 *Aſſiz.* 10. 47 *Aſſiz.* 16.

6. Or indicted or accuſed for an offenſe, for which he ought not to loſe life or member, unleſs in caſes of offenſes againſt acts of parliament, where the acts of parliament exclude bail.

7. Or appeald by an approver, who is ſince dead.

Theſe be the caſes wherein by *that* act the party is bailable.

And therefore though a party be committed, and the tenor of the *mittimus* be to detain him without bail or mainprize, yet if the offence be by law bailable, he that hath the power of bailing may bail him. *Crompt. de Paee* 153. *a.*

This ſtatute adds a penalty, 1. For bailing a perſon not bailable; if he be a ſheriff, conſtable, or bailiff of fee, he ſhall loſe his office: and if he be an under-bailiff, or not a bailiff of fee, he ſhall have three years impriſonment, and be fined at the king's pleaſure. 2. And if he ſhall detain perſons repleviſable after ſurety offered, he ſhall be grievouſly amerced.

And thus far for the ſtatute of 3 *E.* 1.

Burn. Tit. Bail per totum. Index to 2 Haw. P. C. Tit. Bail. 4 Blackſ. Com. ch. 22. Of Commitment and Bail, 296—300.

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[136] CHAP. XVI.

*Concerning the ſtatutes of* 34 E. 3. 1 R. 3. 3 H. 7. 1 & 2 P. & M. 2 & 3 P. & M. *in relation to* bailment of priſoners.

ANTIENTLY moſt of the buſineſs touching bailment of priſoners for felony or miſdemeanors was performed by the ſheriff or ſpecial bailiffs of liberties, either by writ, or *virtute officii.*

But when the offices of juſtices of peace were inſtituted by the ſtatute of 1 *E.* 3. they gradually had the greater buſineſs of committing and bailing offenders devolved into their hands; and by ſucceſſive acts of parliament.

1. The

1. The power of the ſheriff grew out of uſe. 2. The juſtices of peace obtaind moſt of the ſheriff's power in relation to bailment. 3. Their power of bailment is in relation to offenſes extended larger than the ſheriff's, and in ſome kind larger than the limits preſcribed by 3 *E.* 1. 4. Yet in ſome reſpects the ſheriff's power as to bailing in offenſes not capital was enlarged by the ſtatute of 23 *H.* 6. *cap.* 10.

I ſhall therefore take theſe ſeveral ſtatutes in order of time.

I. The ſtatute of 34 *E.* 3. *cap.* 1. gave them power to apprehend malefactors, and to commit them to cuſtody, or to bind them to their good behaviour, which was not intended perpetual, but in nature of bail, *viz.* to appear at ſuch a day at their ſeſſions, and in the mean time to be of good behaviour.

By the ſtatute of 23 *H.* 6. *cap.* 10. there is not only power, but command to the ſheriff to let out by ſufficient ſureties parties arreſted for perſonal actions, and upon indictments of treſpaſs, (except perſons taken by *excommunicatio capiendo*, condemnation, judgment, execution, ſurety of the peace, or by commandment of the juſtices, or perſons taken upon the ſtatute of labourers), yet [137] their power of bailing of felons, &c. by the ſtatute of 3 *E.* 1. continued.

II. By the ſtatute of 1 *R.* 3. *cap.* 3. "Foraſmuch as perſons have "been taken and impriſond upon ſuſpicion of felony, ſometimes up- "on light ſuſpicions, ſometimes by malice, and detaind without bail or "mainprize, it is enacted, that every juſtice of peace within their limits "have power to let ſuch priſoners to bail, as if they had been in- "dicted before them at their ſeſſions, and ſhall have power to in- "quire of eſcapes."

This gave power to any one juſtice of peace to bail any priſoner for felony, and excepts not manſlaughter, but withal ſuppoſeth, that before this act they could not bail till indictment in their ſeſſions; but it ſeems was ſomewhat uncertain, for it was *where they were committed for malice or light ſuſpicions.*

III. The ſtatute of 3 *H.* 7. *cap.* 3. reciting the ſtatute of 1 *R.* 3. and that by colour thereof divers perſons not mainpernable were let to bail, enacts, "That two juſtices of the peace, whereof one of the "*quorum*, have power to let ſuch perſons as are mainpernable by "law, to bail to the next ſeſſions of the peace or gaol-delivery, and "ſhall accordingly return the recognizance under pain of 10*l.*

This ſtatute ſeems, 1. To repeal the ſtatute of 1 *R.* 3. as to bailing by one juſtice, and gives it to two juſtices, whereof one of the *quorum*. 2. It limits alſo the power of bailment only to ſuch caſes as are bailable by law; and therefore, it ſeems, takes *in* the ſtatute of 3 *E.* 1. as the directory what perſons are by law bailable. And thus it ſtood till 1 *Mar.*

IV. By the ſtatute of 1 & 2 *P.* & *M. cap.* 13. theſe two things are principally enacted.

1. That whereas the ſtatute of 3 *H.* 7. is general, that two juſtices ſhall let to bail ſuch as are bailable by law, this ſtatute in expreſs words makes the ſtatute of 3 *E.* 1. the ſtandard for the taking of bail by two juſtices.

[138] 2. That any perſon arreſted for manſlaughter, or other felony bailable by law, or ſuſpicion thereof, ſhall not be bailed but by two juſtices of peace, whereof one of the *quorum*, both to be preſent at the bailing of ſuch offender, and to certify it in writing at the next gaol-delivery; but the juſtices of peace and coroner in *London* [and the county of *Middleſex*, and in other cities, boroughs, and towns corporate within their ſeveral juriſdictions] to do as formerly: juſtices of peace, &c. offending contrary to the true intent of this act, the juſtices of gaol-delivery may fine them.

V. The ſtatute of 2 & 3 *P.* & *M. cap.* 10. only provides for examinations and informations to be taken by the juſtices of peace, as well upon commitment as bailing of any priſoner for manſlaughter, or other felony.

Upon theſe ſtatutes, and that of 3 *E.* 1. which expreſly ſaith, "That *for the death of a man* (*) a perſon is not bailable by law," it hath been queſtiond, whether juſtices of peace may bail in caſe of manſlaughter.

On the one ſide, the ſtatutes of 2 *Mar.* and 3 *Mar.* expreſly admit that they may, and accordingly the uſual practice hath been: *vide Lamb. Juſtice, p.* 25. & *ſequentibus.*

On the other ſide, theſe things make againſt their bailing, *viz.* 1. The ſtatute of *Weſtm.* 1. [3 *E.* 1.] *cap.* 15. recites expreſly, that for the death of a man the offender is not by law bailable, and the very ſtatute of 1 & 2 *P.* & *M.* refers to the ſtatute of 3 *E.* 1. as the rule and ſtandard for juſtices of peace to proceed by, in caſe of bailing.

(*) *Vide Glanvil, Lib.* xiv. *cap.* 1 & 3.

2. Again,

2. Again, the ſtatute of *Glouceſter*, *cap.* 9. (†) expreſly provides, "That he that kills a man by miſadventure, ſhall remain in priſon "till the coming of the juſtices in *eyre* or gaol-delivery, and then he "ſhall be tried;" and if in caſe of a death by *infortunium*, much more in caſe of a ſimple manſlaughter.

3. The writ of *homine replegiando* excepts the caſe of the death of a man from bail.

4. It was reſolved by all the judges of *England*, 7 *Car.* 1. that a man is not bailable for manſlaughter, as I had it from the book of the late chief juſtice *Hyde*, who accordingly did ſet a fine of 20*l.* upon a learned reader, being a juſtice of peace, and [139] now an antient ſerjeant at law for bailing a man in caſe of manſlaughter in the county of *Salop*, which I knew to be true; and this was approved by moſt of the judges that heard it.

To ſettle this buſineſs therefore I ſay,

1. That in caſe of murder it is of all hands agreed, that the juſtices of peace cannot bail, but it is to be done regularly only in the king's bench.

2. That in caſe of manſlaughter, if the fact be apparent by plain proof or confeſſion that a man is kild, and kild by *J. S.* whether the ſame were done *ex malitiâ præcogitatâ*, or upon a ſudden falling out, or but *ſe defendendo*, yet a juſtice of peace, or two juſtices, whereof one of the *quorum* cannot bail by any law in force.

3. That whether it do *conſtare de perſonâ occidentis*, or *de modo occidendi*, or not, yet if the party be indicted of manſlaughter, nay tho it were but *ſe defendendo*, the juſtices of peace cannot bail.

4. But if there be a manſlaughter committed, and it is certainly no more, and a party ſuſpected is brought before two juſtices of the peace, whereof one is of the *quorum*, if the matter be doubtful and uncertain, whether this be the perſon that did the fact, the two juſtices of peace, whereof one is of the *quorum*, may bail *that* man, and that by virtue of the ſtatute of 1 *R.* 3. *cap.* 3. which gave power to one juſtice of peace generally to bail any perſon ſuſpect of felony, if it appear to him to be a light ſuſpicion, (whereof he muſt needs be the judge), which doubtleſs extended to manſlaughter; and altho the ſtatute of 3 *H.* 7. *cap.* 3. transfers that power to two juſtices of peace, whereof one of the *quorum*, yet ſtill it was bottomed upon the ſtatute

(†) 2 Co. *Inſtit.* p. 315.

of

of 1 *R.* 3. and the ſtatute of 1 & 2 *P.* & *M.* is bottomed upon that of 3 *H.* 7.

Again, the ſtatute even of *Weſtminſter* 1. [*viz.* 3 *E.* 1.] tho it ſay *de morte hominis*, there is no bail at common law, yet it muſt be intended, when the offender is certainly known, for it generally provides, that perſons taken upon a light ſuſpicion ſhall be baild; and therefore the ſtatute of 1 & 2 *P.* & *M.* when it makes the [140] ſtatute of *Weſtminſter* 1. the ſtandard of their proceeding in point of bailment, and yet ſuppoſeth one taken for manſlaughter bailable, muſt mean ſuch a manſlaughter, where the party is [only] ſuſpected, not where the thing is done [by him]; for the words *bailable by law*, do not only refer to *felony*, which is the laſt antecedent, but *manſlaughter*: and by this conſtruction, all the ſtatutes, and all parts of the ſtatutes ſtand together *(e)*.

*(e)* Since our author wrote there has been another very material ſtatute in relation to bailment, *viz.* 31 *Car.* 2. *cap.* 2. commonly called the *habeas corpus* act. By this ſtatute, § 7. "If any perſon committed for high treaſon or felony ſhall "pray or petition in open court the firſt "week of the term, or firſt day of the "ſeſſions of *oyer* and *terminer*, or general "gaol-delivery, to be brought to his trial, "and ſhall not be indicted ſome time in "the next term or ſeſſions after ſuch commitment, the court is required upon "motion made the laſt day of the term or "ſeſſions, to ſet at liberty ſuch priſoner "upon bail, unleſs it appears to the court "upon oath made, that the witneſſes for "the king could not be produced the "ſame term or ſeſſions. And if any perſon ſo committed having made his prayer or petition aforeſaid, ſhall not be indicted and tried the ſecond term or ſeſſions after his commitment, or upon his trial, ſhall be acquitted, he ſhall be diſcharged from his impriſonment.

This act (which is related by biſhop *Burnet* in his hiſtory of his own times, *Vol.* I. *p.* 485. to have paſſed the houſe of lords in a very remarkable manner,) is generally eſteemed the great bulwark of *Engliſh* liberty, altho upon ſome important occaſions it has been thought proper, as in treaſon, to ſuſpend it for a time. See 6 *Ann. cap.* 15. 1 *Geo.* 1. *cap.* 8, & *cap.* 30. 9 *Geo.* 1. *cap.* 1.

## CHAP. XVII.

*Concerning the* fourth general, *namely, the* various manner of *bailing priſoners.*

THE fourth thing comes to be conſidered, namely, the different manner of bailing of malefactors.

And this is of two kinds.

*Firſt*, By writ.

*Secondly*, *Ex officio* without a writ.

And

And, *firſt*, Concerning bail by writ.

And theſe are of four kinds. 1. *Homine replegiando.* 2. *Breve de manucaptione.* 3. *Habeas corpus.* 4. *De odio & atiâ.*

I. The writ of *homine replegiando* lies for any perſon impriſond for a miſdemeanor, wherein by the law he is bailable; and therefore in the writ there is an exception of the death of a man, perſons impriſond by the command of the king or his juſtices, or for offenſes of the foreſt, *vel pro aliquo alio recto, quare ſecundùm conſuetudinem Angliæ non ſit replegiabilis. F. N. B.* 66. *f.*

But tho offenſes in the foreſt are excepted, yet a ſpecial writ of *homine replegiando* lies for one taken by the miniſters of the foreſt (*nota*, not by the chief juſtice) *F. N. B.* 67. *a.*

So that this writ as to the point of bailing is founded upon the ſtatute of *Weſtm.* 1. *cap.* 15. or at leaſt governed by it, only in the ſtatute there the exception is of perſons taken by [command of] *the juſtices*, here it is *capitalis juſticiarii.*

By this writ the ſheriff is to deliver the party by mainpriſe; and if he returns, that *J. S.* makes title to the perſon impriſond, either as his villain or ward, *&c.* he is to take ſureties of the party impriſond to appear in the king's bench or common-pleas, and to take bail of him for his appearance at the day, and to attach *J. S.* to appear at the ſame day, *&c.* where the buſineſs may be determind; and if *J. S.* be returned *non eſt inventus*, then a *capias in withernam* may be granted againſt him to take his body, and if a *non eſt inventus* be returned, a *withernam* to take his goods.

II. The writ of mainpriſe, and that is of two kinds, namely, 1. The general original writ *de manucaptione.* 2. Special writs of mainpriſe, both iſſuing out of the *Chancery.*

1. The general writs of mainpriſe are at large ſet down in the *Regiſt. f.* 268. *& ſeq.* and *F. N. B.* 250. *& ſequentibus*, and theſe writs ſeem to be grounded or directed alſo by the ſtatute of 3 *E.* 1. *cap.* 15. for *that* is the rule and direction whereby perſons are to be baild by this general writ; for no perſons criminal are bailable by this common writ of mainpriſe, for as ſuch they are bailable by that ſtatute; and this common writ of mainpriſe reſpects either ſuch as are committed by the ſheriff or bailiff of a hundred, or ſuch as, tho they are in the ſheriff's cuſtody, are yet committed to his cuſtody by others, as juſtices of the peace, *&c.* [142]

1. As

1. As to thoſe of the former kind, we muſt call to remembrance what hath been before ſaid touching the power of the ſheriff to take indictmments of felony, either by commiſſion or in his *Turn*.

The former power is repeald by the ſtatute of 28 *E.* 3. *cap.* 9. As to the latter, though the power of taking indictments continues in the ſheriff's *Turn*, yet by the ſtatute of 1 *E.* 4. *cap.* 2. they are to ſend them to the juſtices of peace to be determind at their ſeſſions; but the ſheriff nor his bailiffs are not to arreſt or attach any perſon thereupon; and the like law is for bailiffs of hundreds, who have a leet of the hundred or *Turn* accompanying it.

And therefore as to theſe, the writ of mainpriſe is conſequentially taken away, according to my lord *Coke*, in his comment *ſuper Weſtm.* 1. *cap.* 15. 2 *Inſtit. p.* 190.

But whereas it is there ſaid, that *by the ſtatute the writ of mainpriſe* generally *is taken away*, it is certainly miſtaken. for the writ of mainpriſe hath ſtill its uſe in caſes of perſons committed by the juſtices of peace, and ſome other caſes, as ſhall be farther ſhewn.

2. The *ſecond* ſort therefore of theſe common writs of mainpriſe, were for ſuch malefactors as were committed by others, if they were ſuch as by the ſtatute of *Weſtm.* 1. *cap.* 15. were bailable, and the writ of mainpriſe in this caſe continues in force and uſe to this day; as for inſtance, *F. N. B.* 250. *d.* for a perſon approved by an approver, if the approver is ſince dead; yet ſuch a perſon can neither be taken by warrant of the ſheriff or juſtice of peace, but by the coroner or juſtices of gaol-delivery.

*F. N. B.* 250. *g.* 251. *c.* for one indicted before the juſtices of peace for a treſpaſs, 250. *i.* for foreſtalling, 250. *e.* as acceſſary to a felony, where the principal is not attaint.

Again, *F. N. B.* 250. *f.* for one taken by the king's commiſſion for felony.

[143] And this is that writ that ſeems intended by the book of 14 *H.* 6. 8. *a.* where it is ſaid, "That he that is taken by "ſuggeſtion, as by juſtices of peace, *&c.* may be bailed without "writ; but he that is taken by a writ, muſt be bailed by writ (*);" which ſeems intended of this writ of mainpriſe; and tho the ſaying be not univerſally true at this day, for ſome that are taken by proceſs or writ may, at leaſt at this day, be bailed *virtute officii*, eſpecially upon the ſtatute of 23 *H.* 6. *cap.* 10. *& Weſtm.* 1. *cap.* 15. yet it

(*) See our author's note *ad F.N.B.* 66. *c.*

ſuf-

ſufficiently intimates, that the writ of mainpriſe was not taken away by 28 *E.* 3. *cap.* 9.

And thus far for the general writs of mainpriſe.

2. Special writs of mainpriſe were ſometimes granted upon ſpecial occaſions for thoſe, that were not bailable otherwiſe.

Thus it was uſual in antient times by the king's ſpecial warrant, ſometimes by ſpecial commiſſion, ſometimes by immediate writ out of *chancery* in times of war, to deliver perſons in priſon for felony upon mainpriſe to go into foreign parts in the king's wars, as *Gaſcoigne*, and elſewhere, at the king's wages, *& ſtabunt recto in curiâ*, after their return, *ſi quis verſus eos loqui voluerit*, and upon the return of ſuch manucaptions into the chancery to have charters of Pardon. See precedents of ſuch commiſſions and writs, *Pat.* 22 *E.* 1. *m.* 1. to *Roger Bratton*, and *William Brereford*. *Rot. Vaſcon.* 22 *E.* 1. *m.* 3. *n°.* 11. & *m.* 12. *n°* 4. for malefactors impriſond in all the gaols in *England* for felony and other crimes *per manucaptionem deliberand'*; and the like was often practiſed upon like occaſions in the reigns of other kings.

And thus far for writs of mainpriſe.

III. The third uſual writ for bailing of criminals, is by *habeas corpus*, and this is a writ of a high nature; for if perſons be wrongfully committed, they are to be diſcharged upon this writ returned; or if bailable, they are to be bailed; if not bailable, they are to be committed.

This writ iſſues out of the great courts of *Weſtminſter*, but hath different uſes and effects.

1. It may iſſue out of the court of *Common-pleas* or *Exchequer*; but that is or ought to be always where a perſon is [144] privileged, or to charge him with an action.

If a perſon is ſued in the common-pleas, or is ſuppoſed to be ſo ſued, and is arreſted for a pre-ſuppoſed miſdemeanor, yea or for felony, an *habeas corpus* lies in the court of *Common-pleas* or *Exchequer*; and if it appears upon the return, that the party is wrongfully committed, or by one that hath not juriſdiction, or for a cauſe for which a man ought not to be impriſond, the privilege ſhall be allowd, and the perſon diſcharged from that impriſonment; or if it be doubtful, he may be baild to appear in the court of *King's-bench*, which hath conuſance of the crime returned. *Coke Magn. Cart. cap.* 29. 2 *Inſtit. p.* 55.

And

And upon this account, *P.* 43 *Eliz. C. B.* in the caſe of *Bates* that was impriſond by the council-table, for not bringing in his ſubſcription to the *Eaſt-India* company, and this being returned upon the *habeas corpus*, together with a writ againſt him out of the common-bench, they adjudged the priviſege to be allowd, and the party to be diſcharged *(a)*.

But if a man be ſued in the common-bench, and is arreſted and impriſond for felony, tho the gaoler, upon the *habeas corpus*, ought to return the cauſes, as well criminal as that wherewith he is charged out of that court, yet the court of common-pleas ought not to commit him to the *Fleet*, nor diſcharge him of the impriſonment, nor yet to take bail of him to anſwer there, for they have not conuſance of ſuch crimes; the like it is, if he be returned committed for a riot or ſurety of the peace by juſtices of peace; and therefore all they can do is to take his appearance, and take him to mainprize upon the action, and remand him as to the matter of crime, for which he was well committed by the juſtices, and to remand his body to the ſheriff's cuſtody upon his commitment for the crime. 2 *H.*

But now by the ſtatute of 16 *Car.* 1. *cap.* 10. they have an original juriſdiction to bail, diſcharge, or commit upon an *habeas corpus* for one committed by the council-table, as well as the [145] king's bench, and that altho there be no privilege for the perſon committed.

2. As to the *King's-bench* and *Chancery*, they have an original power both to grant an *habeas corpus*, and to bail, or diſcharge, or remand, as the caſe requires, tho there be no privilege returned. *Coke* on *Mag. Cart. cap.* 29. 2 *Inſtit. p.* 55. but ſome things they differ in.

The *king's bench* in matters civil grant their *habeas corpus ad faciendum & recipiendum*, and this is done as well in vacation as term, and returnable before any particular judge of that court, or into the court itſelf.

And if there be returned even upon that writ any civil action, and alſo a matter of crime, as if a perſon be arreſted for debt, and alſo charged with a warrant of a juſtice of peace for felony; in that caſe, 1. If it appears to the judge or court, that the arreſt for debt or other

*(a)* See *Moor* 838. *& ſeq.*

civil

civil action is fraudulent, they may remand him. *Dyer* 249. *b. Harriſon*'s caſe. 2. If it be found real, they may commit him to the king's-bench with his cauſes, tho they are matters of crime, for that court hath conuſance, as well of the crime, as of the civil action; but then in the term the court may take his appearance or bail to the civil action, and remand him, if they ſee cauſe, as to the crime to be proceeded on below.

But upon the writ *ad faciendum & recipiendum* there ought not ſingly a matter of crime to be return'd, for that belongs to the *habeas corpus ad ſubjiciendum*.

The other writ is the *habeas corpus ad ſubjiciendum*, which is for matters only of crime, and is not regularly to iſſue nor be returnable but in the term-time, when the court may judge of the return, or bail, or diſcharge the priſoner (*b*).

Till

(*b*) By the ſtatute of 31 *Car.* 2. *c.* 2. ſuch writ may iſſue in the vacation time on behalf of any perſon, who ſtands committed for any crime (unleſs for felony or treaſon plainly expreſt in the warrant of commitment, or as acceſſary before to any petit treaſon, or felony, or upon ſuſpicion thereof,) other than perſons convict or in execution; for by that ſtatute it is provided, "That if any ſuch perſon, or any one on "his behalf, complain to the lord chan- "cellor, or lord keeper, or any one of his "majeſty's juſtices either of the one bench "or of the other, or the barons of the ex- "chequer of the degree of the coif, and the "ſaid lord chancellor, &c. or any of them, "upon view of the copy of the warrant of "commitment or detainer, or otherwiſe "upon oath made, that ſuch copy was de- "nied to be given by ſuch perſon in whoſe "cuſtody the priſoner is detained, are "hereby authorized and required under "the penalty of 500*l.* upon requeſt made "in writing by ſuch perſon or any on his "behalf, atteſted and ſubſcribed by two "witneſſes, who were preſent at the de- "livery of the ſame, to award an *habeas* "*corpus* under the ſeal of ſuch court, "whereof he ſhall then be one of the "judges, to be directed to the officer in "whoſe cuſtody the party ſo committed "or detained ſhall be, returnable *immediatè* "before the ſaid lord chancellor or ſuch "juſtice, &c. and upon ſervice thereof, as "aforeſaid, the officer or his under officer "ſhall (within three days after ſuch ſervice, "if not beyond the diſtance of twenty "miles, or ten days, if above twenty "miles, and not beyond the diſtance of an "hundred miles, or twenty days, if above "the diſtance of one hundred miles), under "the penalty of 100*l.* bring ſuch priſoner "before the ſaid lord chancellor or ſuch "juſtice, &c. before whom the ſaid writ "is made returnable, and in caſe of his "abſence before any other of them, with "the return of ſuch writ and the true "cauſes of the commitment and detainer, "and thereupon, within two days after the "party ſhall be brought before them, the "ſaid lord chancellor, &c. before whom "the priſoner ſhall be brought, as afore- "ſaid, ſhall diſcharge him from his impri- "ſonment, taking his recognizance with "one or more ſureties in any ſum accord- "ing to their diſcretions, having regard to "the quality of the priſoner, and nature of "the offenſe, for his appearance in the "court of king's bench the term following, "or at the next aſſizes, &c. or in ſuch "other court, where the ſaid offenſe is "properly cognizable, as the caſe ſhall re- "quire, and then ſhall certify the ſaid writ "with the return thereof, and the ſaid re- "cognizances into the ſaid court, unleſs "it ſhall appear unto the ſaid lord chancel- "lor, &c. that the party ſo committed is "detained upon a legal proceſs, order, or "warrant out of ſome court, that hath ju- "riſdiction of criminal matters, or by "ſome warrant ſigned and ſealed with the "hand and ſeal of any of the ſaid juſtices, "or barons, or ſome juſtice of the peace "for ſuch matters or offenſes, for which by "law the priſoner is not bailable.

"No perſon to be intitled to the benefit "hereof, unleſs he firſt pay, or cauſe to be "paid or tendered the charges of bringing, "to be aſcertained by the judge or court "that awarded the writ, and indorſed "thereon,

Till the return filed the court may remand him, after it is filed the court is either to diſcharge, or bail, or commit him, as the nature of the cauſe requires.

[147] If together with the *habeas corpus* there iſſues a *certiorari* to remove the indictment, yet in caſe of felony tho the body and record be returned and filed, the court may remand him and the record by the ſtatute of 6 *H.* 8. *cap.* 6. but in other caſes the record cannot be remanded, but they muſt proceed in the king's bench both to pleading, trial, and judgment.

But if the body be removed by *habeas corpus*, and the record alſo by *certiorari*, but the record not filed, tho the return upon the *habeas corpus* be filed, a *procedendo* may iſſue to the court below.

And thus far for the *habeas corpus* in the king's bench.

By virtue of the ſtatute of *Magna Charta*, and by the very common law, an *habeas corpus* in criminal cauſes may iſſue out of the *Chancery*. *Coke* on *Magna Charta*, *cap.* 29. 2 *Inſt. p.* 55.

But it ſeems regularly this ſhould iſſue out of this court in the vacation time, but out of the king's bench in the term-time, as in caſe of a *ſuperſedeas* upon a prohibition. 38 *E.* 3. 14. *a. B. Superſedeas* 13.

When the cauſe is returned, the chancellor may judge of the ſufficiency or inſufficiency thereof, and may diſcharge or bail the priſoner to appear in the king's bench, or may *propriis manibus* deliver the record into the king's bench, together with the body, and thereupon the court of king's bench may proceed to bail, diſcharge, or commit the priſoner.

But if the chancellor ſhall not diſcharge him, but bail him, this ſurety muſt be to appear in the king's bench; or if the chancellor ſhall

" thereon, not exceeding 12*d. per* mile, " and give ſecurity by his own bond to pay " the charges of carrying back, if remanded " by the court or judge, and that he will " not make any eſcape by the way."

Is is further provided by the ſtatute, " That no perſon ſet at large upon any " *habeas corpus* ſhall be recommitted for " the ſame offenſe, but by order of court " having juriſdiction of the cauſe; any per- " ſon knowingly offending herein to for- " feit 500*l.*

" This writ to run into counties palatine " and privileged places.

" That no ſubject of *England* be ſent pri- " ſoner into *Scotland*, or any places beyond " the ſea, either within or without his " Majeſty's dominions, under the penalty " of a *præmunire*, except perſons ordered " to be tranſported, or offenders ſent to be " tried, where their offenſes were com- " mitted.

" That after the aſſizes proclaimed and " during the continuance thereof no pri- " ſoner be removed but before the judge " of aſſiſe in open court, nor at any other " time, but by *habeas corpus*, or other legal " writ, except where the priſoner is de- " livered to the conſtable, &c. to be carri- " ed to the common gaol; or where any " perſon is ſent by order of any judge of " aſſiſe, or juſtice of peace, to the com- " mon workhouſe or houſe of correction; " or is removed from one place to another " within the ſame county, in order for his " trial or diſcharge in due courſe of Law; " or in caſe of ſudden fire, infection, or " other neceſſity."

do

do neither, it ſeems he may commit him to the *Fleet* till the term, and then he may be turned over to the king's bench, and there proceeded againſt, for the chancellor hath no power to proceed in criminal cauſes.

And if the *habeas corpus*, and alſo a *certiorari* be granted, returnable in *Chancery*, and the cauſe and body be returned there, they may be ſent into the king's bench; if the body only be returned with his cauſes by *habeas corpus* into the *Chancery*, and delivered over into the king's bench, they may proceed to the determination of the return, and either by *procedendo* remand him, or grant a *certiorari* to certify the record alſo, and thereupon commit or bail the priſoner, as there ſhall be cauſe. [148]

But the ſending an *habeas corpus ad faciendum & recipiendum* by the chancellor for perſons arreſted in civil cauſes, eſpecially being in execution, is neither warrantable by law, nor antient uſage, and particularly forbidden by the ſtatute 2 *H.* 5. *cap.* 2. as to perſons in execution.

And thus far of bailing by *habeas corpus*.

IV. Touching the writ *de odio & atia* for a man accuſed of manſlaughter, in ſome places called a writ *de bono & malo* and *de ponendo ad ballium*, it is grounded upon the ſtatute of *Magna Charta*, *cap.* 26. repealed by 28 *E.* 3. *cap.* 9. and revived again, as is ſuppoſed, by 42 *E.* 3. *cap.* 1. whereby all acts made againſt *Magna Charta* are repealed. It is a writ much out of uſe, but the whole learning concerning it is put together by my lord *Coke* upon *Magna Charta*, *cap.* 26. 2 *Inſtit. p.* 42. and upon *cap.* 29. 2 *Inſt. p.* 55. and thither I ſhall refer myſelf.

It has been diſuſed by reaſon of the great trouble in the attaining and execution of it, for, 1. There muſt be a writ to inquire *de vita & membris*. 2. There muſt be an inquiſition taken. 3. He was to be bailed by twelve perſons.

And now the juſtices of gaol-delivery uſually going their circuits twice a year, unleſs in the four northern counties, a priſoner comes to his trial as ſoon, if not ſooner, than ſuch inquiſition and mainprize can be taken.

And thus far of manucaption or bail by writ.

The *ſecond* general is bailing *virtute officii*.

The court of king's bench may *virtute officii* bail any perſon brought before them, of what nature ſoever the crime is, even for treaſon or murder, as hath been before ſhewn, *p.* 129.

Concerning bailment of felons by juſtices of the gaol-delivery and of the peace *virtute officii*, and the ſtatutes relating to them, enough hath been ſaid before.

The ſheriff, it ſeems, might *ex officio* without writ at common law bail offenders indicted before him in his *Turn*, or upon a commiſſion to him; but this power is in effect taken away from him in [149] caſes of felony, by the ſtatutes of 28 *E.* 3. *cap.* 9. and by the ſtatute of 1 *E.* 4. *cap.* 1. and 1 *R.* 3. *cap.* 3. transferred to the juſtices of the peace, as hath been before declared.

The marſhal of the king's bench took upon him antiently *virtute officii* to bail perſons indicted or appealed; but this is wholly taken from him by the ſtatute of 5 *E.* 3. *cap.* 8.

3 Wilſon. 172. 188.

## CHAP. XVIII.

*Concerning* warrants to ſearch for ſtolen goods, *and* ſeizing *of them.*

I THOUGHT fit to inſert this buſineſs in this place. 1. Becauſe it is a buſineſs preparatory to the diſcovery of felons, and preparing evidence againſt them, and to the helping of perſons robbed to their goods. 2. Becauſe it is found by experience of great uſe and neceſſity, eſpecially in theſe times, where felonies and robberies are ſo frequent. And therefore this means of diſcovering of them is now grown common and uſual, much more than in antient times; and if it ſhould be diſuſed or diſcountenanced, it would be of public inconvenience; and therefore I can by no means ſubſcribe to that opinion of my lord *Coke*'s, 4 *Inſtit. cap.* 31. *p.* 176. as it is there generally ſet down, "That juſtices "of peace have no power upon a bare ſurmiſe to break open any man's "houſe to ſearch for a felon or ſtolen goods either in the day or "night." *(c)*.

The moderation and temperaments that are to be added to theſe warrants, are theſe:

[I. Touching the granting thereof.]

*(c) Vide ſupra, p.* 79, *&* 107.

1. They

1. They are not to be granted without oath made before the juſtice of a felony committed, and that the party complaining hath probable cauſe to ſuſpect they are in ſuch a houſe or place, and do ſhew his reaſons of ſuch ſuſpicion.

And therefore I do take it, that a general warrant to ſearch in all ſuſpected places is not good, but only to ſearch in ſuch particular places, where the party aſſigns before the juſtice his ſuſpicion and the probable cauſe thereof, for theſe warrants are judicial acts, and muſt be granted upon examination of the fact.

And therefore I take thoſe general warrants dormant, which are made many times before any felony committed, are not juſtifiable, for it makes the party to be in effect the judge; and therefore ſearches made by pretenſe of ſuch general warrants give no more power to the officer or party, than what they may do by law without them.

2. It is fit that ſuch warrants to ſearch do expreſs, that ſearch be made in the day-time, and tho I will not ſay they are unlawful without ſuch reſtriction,, yet they are very inconvenient without it, for many times, under pretenſe of ſearches made in the night, robberies and burglaries have been committed (*), and at beſt it creates great diſturbance.

3. They ought to be directed to conſtables and other public officers, whereof the law takes notice, and not to private perſons, tho it is fit the party complaining ſhould be preſent and aſſiſtant, becauſe he knows his goods.

4. It ought to command, that the goods found, together with the party in whoſe cuſtody they are found, be brought before ſome juſtice of the peace, to the end that upon farther examination of the fact the goods and party, in whoſe cuſtody they are found, may be diſpoſed, as to law ſhall appertain.

And the reaſon is, tho the receiving of ſtolen goods doth not *ipſo facto* make a man an acceſſary to felony, tho he know them to be ſtolen (†), yet he carries with it a great preſumption, that the receiving of them was to aid the felon; and beſides, by the [151] examination of the receiver evidence may be gotten to diſcover the felon.

(*) *Vide Part* I. *p.* 553. *Co. P. C. p.* 64. *Kel.* 43.

(†) But now by 3 & 4 *W. & M. cap.* 9. & 5 *Ann. cap.* 31. whoever knowingly buys or receives ſtolen goods ſhall be taken as acceſſary to the felon. *Vide Part* I. *p.* 620.

II. Touching the execution of this warrant.

1. Whether the ſtolen goods are in the ſuſpected houſe or not, the officer and his aſſiſtants in the day-time may enter *per oſtia aperta* to make ſearch, and it is juſtifiable by this warrant.

2. If the door be ſhut, and upon demand it be refuſed to be opened by them within, if the ſtolen goods be in the houſe, the officer may break open the door, and neither the officer nor the party that comes in his aſſiſtance are puniſhable for it, but may juſtify it upon the general iſſue by the ſtatute of 7 *Jac. cap.* 5. ſo that *in eventu* it is juſtifiable by both, for it is a proceſs for the king, and includes a *non omittas*, and the very having of the goods carries a ſufficient ground *primâ facie* of ſuſpicion, that he was the felon that ſtole them, and may be thereupon juſtifiably arreſted.

3. If the goods be not in the houſe, yet it ſeems the officer is excuſed that breaks open the door to ſearch, becauſe he ſearcheth by warrant, and could not know whether the goods were there till ſearch made; but it ſeems the party that made the ſuggeſtion is puniſhable in ſuch caſe, for as to him the breaking of the door is *in eventu* lawful or unlawful, *viz.* lawful, if the goods are there; unlawful, if not there.

III. Now upon the return of this warrant executed, the juſtice, before whom it is returned, hath theſe things to do:

1. As touching the goods brought before him, if it appears they were not ſtolen, they are to be reſtored to the poſſeſſor; if it appears they were ſtolen, they are not to be delivered to the proprietor, but depoſited in the hand of the ſheriff or conſtable, to the end the party robbed may proceed by indicting and convicting the offender to have reſtitution.

2. As touching the party, that had the cuſtody of the goods.

If they were not ſtolen, then he is to be diſcharged.

If ſtolen, but not by him, but by another that ſold or delivered them to him, if it appears that he was ignorant that they were ſtolen, he may be diſcharged as an offender, and bound over to give evidence as a witneſs againſt him that ſold them; if it appears he was knowing they were ſtolen, it is fit to bind him over to anſwer the felony, for there is a probable cauſe of ſuſpicion, at leaſt that he was acceſſary *after*.

[152]

Burn. Title Search-warrant, per tot.

CHAP.

## CHAP. XIX.

*Concerning* Preſentments, Inquiſitions, *and* Indictments, *and their kinds.*

I HAVE gone through thoſe matters, that are preparatory to the proceeding againſt malefactors in the ſeveral courts, wherein their offenſes are puniſhable, namely, the arreſt and impriſonment, or bailing of offenders, and the ſeveral juriſdictions, and juſtices, and miniſters of juſtice concerned therein.

That which follows to be conſidered is the manner of bringing the offender to his legal trial and judgment, which is either by appeal, which is the ſuit of the party, or by indictment which is immediately the king's ſuit.

The former of theſe, namely appeals, I ſhall conſider after the buſineſs of indictments, becauſe it is but rare to have an appeal, and the moſt proſecutions of this nature are by indictment or preſentment, and therefore I ſhall conſider this firſt.

I ſhall diſtribute this matter into theſe general heads, namely, 1. Touching indictments and preſentments. 2. Proceſs. 3. Arraignment. 4. Pleas of the offender. 5. Trial. 6. Judgment. 7. Execution. Each of which will take in ſeveral particular heads and diſtributions.

*Preſentment* is a more comprehenſive term than *indictment*, for regularly an indictment is an accuſation given *in* againſt a perſon by the grand inqueſt for ſome miſdemeanor whereunto he is put to anſwer; but preſentments do not only include ſuch indictments, but alſo ſome other informations whereunto the party is not put to anſwer, as preſentments of *felo de ſe*, of *fugam fecit*, of deodands, of deaths *per infortunium*, and many others. [153]

In this title concerning preſentments and indictments I ſhall conſider theſe points. 1. The ſeveral kinds of preſentments and indictments. 2. Where a man ſhall be put to anſwer in criminals without indictment. 3. Who may be indicters, and how returned. 4. Of what they may inquire. 5. What the penalty of not inquiring or preſenting. 6. What formalities are required in indictments.

Firſt, Touching the ſeveral kinds of preſentments, inquiſitions and indictments in matters capital.

They may be diſtinguiſhed, 1. In relation to the courts or judicatories, or juriſdictions, where they are made.

And, 2. In reſpect of their effects or natures.

I. Touching the former branch of diſtribution in relation to the juriſdictions where made, and *that* multiplies preſentments or indictments according to the juriſdictions, as ſome are in the leet, ſome in the ſheriff's *Turn*, ſome before the coroner, ſome before juſtices of peace, juſtices of *oyer* and *terminer*, gaol-delivery, king's bench, whereof enough before hath been ſaid, and ſhall not need here to be repeated.

But thoſe, that moſt concern capital offenſes, are ſuch as are taken before the coroner, or ſuch as are taken before juſtices by commiſſion, whereof more ſhall be ſaid in the enſuing chapters.

II. As to the ſecond kind of diſtribution in reſpect of the nature and effect thereof.

1. Some preſentments are of themſelves convictions, and not traverſable.

2. Others are not convictions, but only in nature of informations, and therefore traverſable.

Regularly all preſentments or indictments before juſtices of the peace, *oyer* and *terminer*, gaol-delivery, *&c.* are traverſable, and conclude not the party or thoſe claiming under him.

[154] And therefore, tho it hath been held, that the preſentment of a *felo de ſe* before the coroner be not traverſable, *(de quo ſupra,)* yet of all hands it is agreed, that a preſentment of a *felo de ſe* before juſtices of peace or *oyer* and *terminer* is traverſable by the executors, *&c. Co. P. C. cap. 8. p. 55. H. 37 Eliz. B. R. Laughton*'s caſe.

If a preſentment be made *ſuper viſum corporis*, that *A.* kild *B.* and fled, this preſentment of the flight is held not traverſable, but concluſive to forfeit the goods, tho he be after acquitted of the felony, and expreſly found by the petty jury upon his trial, that *non ſe retraxit (d)*, 13 *H.* 4. 13. *b. Forfeiture* 32. 3 *E.* 3. *Forfeiture* 35. 7 *Eliz. Dy.* 238. *b.* And the ſame law is, if it be found *ſuper viſum corporis*, that the felon fled and was kild in the flight, this preſent-

(d) *Vide ſupra, p.* 63, 64.

ment,

ment, tho after the party's death, is concluſive as to the forfeiture for the flight. 3 *E.* 3. *Coron.* 289, 290. 312.

But if before juſtices aſſigned to hear and determine, it be preſented, that *J. S.* committed a felony and fled; or if upon the arraignment of a perſon for felony he be found not guilty, and that he fled, this is but in nature of an inqueſt of office, and the flight is traverſable in an action, or information, or *ſcire facias* brought by the king for the goods of the perſon; 37 *Aſſiz.* 7. 47 *E.* 3. 26. *a.* And all the reaſon, that can be given why the coroner's inqueſt of a *fugam fecit* is concluſive, and not the other, is only that which is given 8 *E.* 4. 4. *a. Ceo eſt un ancient poſitif ley del coron'.*

If a man be preſented to have ſufferd an eſcape, becauſe in this caſe the party is at leaſt to be fined, he ſhall have his traverſe to it, and is not concluded by it.

But if either before the juſtices in *eyre*, or before the coroner, an eſcape be preſented upon a vill either before or after the arreſt, this is held not to be traverſable, becauſe there is only an amercement to be ſet upon the vill, *viz. villata in miſericordiâ*; and the reaſon given by *Stamford* is, *quia de minimis non curat lex*; *Stamf. P. C. Lib.* I. *cap.* 32. *f.* 35. *b.*

But if it fall out, that there be an indictment for ſuch an eſcape, (as there hath been been formerly againſt the city of *London* for the eſcape of thoſe that riotouſly kild Dr. *Lamb (e)*, who were thereupon fined 2000*l.*) ſuch an indictment is not concluſive, but traverſable. [155]

Whether an inquiſition of a *felo de ſe* before the coroner be traverſable, *vide quæ ſupra, Part.* I. *cap.* 31. *p.* 414.

And there are no preſentments beſides what are before mentiond, that are in themſelves convictions and not traverſable, but a preſentment in a leet of bloodſhed or the like, and in the *Swanimote* court of the foreſt for offenſes of *Vert* and *Veniſon*.

But even thoſe preſentments are traverſable alſo in two caſes, *viz.* 1. If the offenſe preſented be out of their juriſdiction. 2. Or if the preſentments be ſuch as concerns the freehold, as preſentments of nuiſances, or ſuch matters as charge the freehold; 41 *E.* 3. 26. *b.* 45 *E.* 3. 8. *b.*

And therefore it was reſolved in the *Exchequer* in a *quo warranto* againſt the water-bailiff and conſervator of the river *Severn*, 22 *Car.* 2.

(*d*) *Cro. Car.* 252.

that upon a bare preſentment the conſervators cannot ſet a fine upon a ſuppoſed unlawful fiſhing or the like, unleſs the party comes *in* and confeſſes it, or pleads to it, and be convicted by a jury of the offenſe.

A preſentment of a riot or forcible detainer by a juſtice or two juſtices of peace, as the caſe ſhall require, is a conviction by the ſtatute of 15 *R.* 2. *cap.* 2. 8 *H.* 6. *cap.* 9. 13 *H.* 4. *cap.* 7.

But a preſentment by a juſtice of a default in repairs of an highway, tho by the ſtatute of 5 *Eliz. cap.* 13. it is ſuch a preſentment as the parties ſhall be put to anſwer, yet it is not concluſive, but the traverſe of the party is ſaved by the ſtatute; and it is but reaſon, for tho the view of the juſtice can aſcertain the decay or want of repairs, yet it cannot aſcertain in what pariſh it lies, or who is bound by tenure or preſcription to repair.

Burn. Titles. Indictment & Preſentment. 4 Blackſ. Com. ch. 23. p. 301, 302—307. Index to 2 Hawk. P. C. tit. Indictment. Preſentment.

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[156] CHAP. XX.

*Where a man ſhall be* put to anſwer *in* criminal *and* capital offenſes without indictment *at the king's ſuit.*

AT the common law there were ſeveral means of putting the party to anſwer a felony without any indictment, ſome whereof are ſtill in force, others are taken away by ſtatute.

I. If a thief or robber were taken with the *mainouvre, cum manu opere,* and the *mainouvre* brought into court with the priſoner, he ſhould have been arraigned upon the *mainouvre* at the king's ſuit; 2 *E.* 3. *Coron.* 156. And therefore *M.* 18 & 19 *E.* 1. *coram rege, rot.* 28. *Norf. Et quia prædictus* Johannes de Brampton [*falſarius ſigilli regis & breviùm ſuorum, ut dicitur,*] *non eſt appellatus, nec indictatus, nec captus cum manu opere, per quod ſecta domino regi in hujuſmodi caſu poteſt competere, ideò* [*conſideratum eſt, quòd*] *prædictus* Johannes [*eat inde*] *ſine die,* &c.

And *T.* 10 *E.* 2. *rot.* 132. *Bucks, Robert Legat* was arraigned for counterfeiting the king's ſeal, upon the counterfeit commiſſion brought

brought into court without indictment, and he pleaded not guilty, and was acquit (*).

But upon a bare information or bill, without indictment or the *mainouvre* at common law, no party was to be put to anſwer for a felony; and therefore, *M.* 20 & 21 *E.* 1. *coram rege, rot.* 27. *Hibernia, William Prene*, the king's carpenter in *Ireland*, being accuſed for felony by a bill in the king's-bench there, and convicted and condemned, but after ranſomed for 200*l.* and a writ of error brought in the king's-bench in *England*, and aſſigned, that he ought not to be put to anſwer in caſe of life or member *per votem & per billam, quam* Nigellus le Broun, *porrexit versùs ipſum, licèt non eſſet indictatus per* 12. *(f)*. [149*]

But it ſeems to me, that this proceeding upon the *mainouvre* is wholly taken away by the ſtatutes of 25 *E.* 3. *cap.* 4. 28 *E.* 3. *cap.* 3. 42 *E.* 3. *cap.* 3. and therefore I do not find any proceeding upon the *mainouvre* ſince theſe ſtatutes.

II. A ſecond ſort of proceeding in caſes capital without indictment is, where an appeal is brought at the ſuit of the party, and the plaintiff is nonſuit upon that appeal, yet the offender ſhall be arraigned at the king's ſuit upon ſuch appeal; and ſo it is in caſe the appellant die or releaſe; and in ſuch caſe, altho the party be indicted as well as appeald, yet upon the nonſuit of the plaintiff, the pooceeding for the king ſhall not be upon the indictment, but upon the appeal. 4 *E.* 4. 10. *a.*

But this hath theſe two qualifications.

1. It muſt be where the plaintiff in the appeal hath either declared upon his appeal by writ, or formed his appeal by bill, for the bare ſuing of a writ without a declaration is not ſuch an appeal as, the party being nonſuit, the defendant ſhall be thereupon arraigned; for

(*) *Vide Part* I. *p* 186 & 349.

*(f)* That caſe was thus: *William Prene* aſſigned for error that "par ceo que le "commune laie de *Engleterre*, e de *Ire-* "*laund*, veut, ke nul homme par bille "ſaunz enditement, ou par ſute de apel, "ſuz les plez de corone, ne ſait [ſoit] "attache, ne mis en reſpounz; yet that "he the ſaid *William* had been impriſond, "& *de diverſis feloniis acculpatus* par une "bille par *Nel le Broun* bote en mayns "des juſtices; altho par enqueſt, ne par "chapiter, ne fut endite." And upon conſideration of the whole matter the court of king's-bench in *England* were of opinion, "Quod prædictum recordum eſt "irritandum, & adnichilandum; & ideò "mandatum eſt capitali juſtic' *Hiberniæ*, "quòd corrigat, &c. & acceptâ ſecuritate "de prædicto *Willielmo* ad ſtandum recto "in com' ubi ei liquiſſe debuit, & vocatis "ſuper hoc convocandis ponat prædictum "*Willielmum* per apertum & manifeſtum "indictamentum de certis feloniis in cer- "tis locis, ſi aliquis vel aliqui eum fortè "indictare ſive appellare voluerit ſecun- "dùm legem & conſuetudinem regni, &c. "& quòd interim per manucaptionem bo- "na & catella, terras & tenementa, eidem "*Willielmo* deliberet, &c.

1. The

1. The writ may be brought in his name by a ſtranger without his privity. 2. Becauſe the writ alone contains not ſuch certainty of time, place, and other matters, whereby the party may be put to anſwer. 7 *H.* 7. 6. *b.*

2. It muſt be where an appeal is well begun, and by a party enabled to proſecute it, therefore, if the appeal abates, becauſe a plaintiff is outlawed, or a woman (who cannot bring an appeal, but only of the death of her huſband,) or if the year and day be paſt, [150*] or by the miſnoſmer of the defendant, *&c.* there the appellee ſhall not be arraigned at the king's ſuit, becauſe the appeal was never good, but ſhall be diſmiſſed, only the judges may arraign him upon an indictment, if any be before them for that offenſe, or if none be, yet they may bind him over to another ſeſſions, and in the mean time to be of good behaviour; 19 *E.* 2. *Coron.* 317. All the learning touching this buſineſs is fully declared by *Stamf. Lib.* III. *cap.* 59. *f.* 147. *& ſequentibus.*

III. A third ſort is upon an appeal by an approver, but the whole learning touching that will come in its proper place hereafter *(g)*.

IV. The fourth ſort is by appeals by particular perſons, eſpecially of treaſon in parliament; and this was very frequent in antient times, eſpecially in the time of *R.* 2. namely *anno ſeptimo, undecimo & duodecimo*, which bred great inconveniencies.

And therefore by the ſtatute of 1 *H.* 4. *cap.* 14. all theſe kinds of appeals in parliament are wholly taken away; and ſince that time I find not any ſuch appeals brought in parliament.

And therefore, when the now earl of *Briſtol*, in this preſent parliament, in the lords houſe preferd articles of high-treaſon and other miſdemeanors againſt the earl of *Clarendon*, then lord chancellor, upon a reference unto all the judges, and upon great conſideration the judges *unâ voce* returned their opinion, that theſe articles were contrary to the ſtatute of 1 *H.* 4. and could not be preferd in the lords houſe by the ſaid earl, or any other private perſon *(h)*.

But impeachments by the houſe of commons of high treaſon, or other miſdemeanors in the lords houſe have been frequently in practice, notwithſtanding the ſtatute of 1 *H.* 4. and are neither within

*(g) Vide infra, cap.* 29. *p.* 226. *(h)* See *Stat. Tr.* Vol. II. *p.* 550.

the

the words nor intent of that ſtatute, for it is a preſentment by the moſt ſolemn grand inqueſt of the whole kingdom.

V. If in a civil action *de uxore raptâ cum bonis viri*, upon not guilty pleaded, the defendant be convicted, this antiently ſerved in nature of an indictment of felony, 13 *Aſſiz.* 6. 18 *E.* 3. 32. *a. Stamf. P. C. f.* 94. *b.* So if upon a ſpecial verdict in treſpaſs brought in the king's-bench, it be found, that the de- [151*] fendant took them felonioufly, antiently this ſerved for an indictment. 31 *E.* 1. *Enditement* 31.

So if in an action of ſlander for calling a man thief, the defendant juſtifies that he ſtole goods, and iſſue thereupon taken, it be found for the defendant, if this be in the king's-bench, and for a felony in the ſame county where the court ſits, or if it be before juſtices of aſſize, who have alſo a commiſſion of gaol-delivery, he ſhall be forthwith arraigned upon this verdict as on an indictment, and the reaſon is, becauſe here is a verdict of twelve men in theſe caſes, and ſo the verdict, tho in a civil action, ſerves the king's ſuit as an indictment, and is not contrary to the acts of 25, 28, & 42 *E.* 3. which enact, *that no man ſhall be put to anſwer, &c. but upon indictment or preſentment.*

But if the ſheriff returns a reſcue of a priſoner taken for felony, 1 *H.* 7. 6. *a.* or a breach of priſon by one arreſted for felony, 2 *E.* 3. 1. *b.* this is not ſufficient to arraign the party, nor doth it countervail an indictment, for it is not by the oath of twelve men; *vide hoc totum, Stamf. P. C. Lib.* II. *cap.* 29. *f.* 95. *a.*

By the ſtatute of 11 *H.* 7. *cap.* 3. there was power given to proceed upon all penal ſtatutes by information before juſtices of aſſize and peace, but there is an exception of all caſes of treaſon, murder and felony.

Ill uſe was made of this ſtatute by *Empſon* and *Dudley*, and great inconvenience and trouble to the people did ariſe by it, and therefore by 1 *H.* 8. *cap.* 6. it was repeald.

And tho informations are practiſed oftentimes in the crown-office in caſes criminal, and by many penal ſtatutes the proſecution upon them is by the acts themſelves limited to be by *bill, plaint, information* or *indictment*, yet thus much is obſervable.

1. That the method of proſecution of *capital* offenſes is ſtill to be by indictment, except the caſes above mentiond.

2. That

2. That in all criminal cauſes the moſt regular and ſafe way, and moſt conſonant to the ſtatutes of *Magna Carta*, *cap.* 29. 5 *E.* 3. *cap.* 9. 25 *E.* 3. *cap.* 4. 28 *E.* 3. *cap.* 3. & 42 *E.* 3. *cap.* 3. is by preſentment or indictment of twelve ſworn men.

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[152*] CHAP. XXI.

*Who may be indictors, and where and how returned.*

INQUISITIONS, preſentments, or indictments are taken before courts, or officers of ſeveral kinds, and accordingly by acts of parliament ſeveral things are preſcribed touching them.

I. Touching inqueſts before coroners: By the ſtatute of 4 *E.* 1. *De officio coronatoris*, the coroner is to iſſue his precept to four, five or ſix vills to appear before him at a certain day to make inquiry, this precept is directed to the conſtables of the vills, who accordingly give ſummons to a competent number of inquirers, twelve at leaſt *(i)*, and by them the inquiſition is made, when they have been ſworn and have heard their evidence upon oath taken before the coroner.

II. Touching inqueſts of felonies in leets and *Turns*. By the ſtatute of *Weſtminſter* 2. *cap.* 13. indictments in the ſheriffs *Turns* are to be by twelve at leaſt, and they are to ſet their ſeals to the inquiſitions, otherwiſe they are void *(k)*.

And by the ſtatute of 1 *E.* 3. *cap.* 17. which extends as well to leets as *Turns*, they are to be by indenture, one part to remain with the indictors, the other with the ſheriff or ſteward.

And by the ſtatute of 1 *R.* 3. *cap.* 4. no perſon ſhall be returned upon a pannel in the ſheriff's *Turns*, unleſs he hath 20*s.* *per ann.* of freehold, or 26*s.* 8*d.* of copyhold, and all indictments in the *Turn* taken otherwiſe ſhall be void.

But now by the ſtatute of 1 *E.* 4. *cap.* 2. the ſheriff cannot proceed upon any indictments for felony, or otherwiſe taken in his *Turn*, but muſt ſend them to the ſeſſions of the peace, and the juſtices there are to make proceſs and proceed thereupon.

*(i)* Cobat's caſe *ſupra*, *p.* 161. *in notis.* *(k)* 2 *Co. Inſtit. p.* 387.

But

But then there muſt be care taken, 1. That the indictments be of ſuch matters only, as are within the juriſdiction of the ſheriff's *Turn*, otherwiſe the juſtices may not proceed upon them, 4 *E.* 4. 31 *a.* 8 *E.* 4. 5. *b.* (*) and 2. That they be by indenture, and under the ſeals of the preſenters, according to the former ſtatutes. [153*]

III. Indictments taken in the county of *Lancaſter* before the ſheriff or juſtices againſt any perſon inhabiting out of the ſame county, or taken in any other county againſt inhabitants of the county of *Lancaſter*, ought to be by twelve men, and each indictor to have lands or tenements of the yearly value of 5*l.* by the ſtatute of 33 *H.* 6. *cap.* 2. (†).

IV. Touching murders, &c. committed in the king's palace, the ſtatute of 33 *H.* 8. *cap.* 12. hath appointed, that twenty-four of the king's yeomen officers of the cheque-roll of the king's houſe ſhall be returned to make inquiry, and the trial to be by a jury of the gentlemen officers.

V. Concerning inquiries to be made before juſtices itinerant, the courſe was this: There firſt went out the writ of the common ſummons of the *eyre*, directed to the ſheriff to ſummon *de quâlibet villâ quatuor homines & præpoſitum, & de quolibet burgo duodecim legales burgenſes*, to be at the day and place for the *eyre*, and upon that day the ſheriff and lords of liberties were to return the names of the bailiffs of their hundreds and liberties, and thoſe bailiffs were ſworn to elect two men in their ſeveral hundreds, and preſent their names to the court, and theſe two hundreders for each hundred were to chooſe of themſelves, and the reſt of their ſeveral hundreders reſpectively, ordinarily ſixteen, or ſometimes only twelve, who were ſeverally ſworn upon inquiries and preſentments of things done within their hundred, as ſo many grand inqueſts for every ſeveral hundred, and the twelve returned for each borough were the grand inqueſt for the borough; this cauſed a vaſt and chargeable attendance upon the courts in *eyre*, and hath been long diſuſed, and therefore I ſhall not ſay more of it.

VI. Concerning the chooſing and returning of the grand jury before juſtices aſſigned to keep the peace, *oyer* and *terminer*, and gaol-delivery, I ſhall be ſomewhat more large; becauſe, before theſe juſtices, ordinarily, criminal and capital cauſes are heard and determined.

(*) *Vide ſupra*, *p.* 71. (†) *Part* I. *p.* 286.

Upon

Upon the ſummons of any ſeſſion of the peace, there goes out a precept either in the name of the king, or of two or more juſtices of peace, directed to the ſheriff, that *non omittas propter aliquam libertatem in ballivâ tuâ, quin eam ingrediaris, & venire fac' tali die ac loco viginti quatuor liberos & legales homines de quolibet hundredo in ballivâ tuâ, tàm infra libertates, quàm extra, ad faciendum & exequendum ea quæ ex parte domini regis tunc & ibidem eis injungantur*, and a *ſcire fac'* to all coroners, conſtables, and bailiffs, &c. to be there at that day. *Lamb. Lib.* II. *cap.* 2.

And according to others, *Venire fac' viginti quatuor liberos & legales homines de quolibet hundredo in ballivâ tuâ, quorum quilibet habeat* 40s. *per ann. liberi tenementi ad minus, venire fac' etiam viginti quatuor tàm milites quàm alios probos & legales homines de corpore com' tui, quorum quilibet habeat* 40s. *de terris & tenementis liberi tenementi, ad inquirend' ſuper iis, quæ ex parte domini regis ad tunc & ibidem eis injungerentur, præmunientes, omnes juſticiarios ad pacem, conſtabularios, &c.* Crompt. *f.* 212. *a.*

And in caſes of commiſſions of *oyer* and *terminer*, and gaol-delivery, *Quod non omittas propter aliquam libertatem, quin eam ingrediaris, & venire fac' tàm viginti quatuor probos & legales homines de quolibet hundredo com' prædict', ad inquirendum, præſentandum, faciendum & exequendum ea omnia, quæ ex parte domini regis tunc & ibidem eis injungerentur, quàm alios viginti quatuor probos & legales homines de com' prædict' ad faciend' juratam inter dominum regem & priſones prædictos, &c. Co. Entr. f.* 55. *a.*

Upon this precept the ſheriff is to return twenty-four or more out of the whole county, namely, a conſiderable number out of every hundred, out of which the grand inqueſt at the ſeſſions of the peace, *oyer* and *terminer*, or gaol-delivery, are taken and ſworn *ad inquirendum pro domino rege & corpore comitatûs*, (not as antiently in *eyre*, a kind of grand inqueſt out of every hundred); but in ſome counties, which conſiſt of gildable and ſuch franchiſe, where anciently ſeveral juſtices of gaol-delivery ſat, as in *Suffolk* (*), there are two grand juries, one for the gildable, another for the franchiſe, becauſe there are two ſeveral commiſſions of gaol-delivery.

[155*] Now touching the grand jury thus returned before juſtices aſſigned, there are ſome things conſiderable.

(*) *Vide ſupra, p.* 26.

They

They muſt be *probi & legales homines*, and therefore if any one of the indictors be outlawd, tho in a perſonal action, it is a ſufficient plea to avoid the indictment; 11 *H.* 4. 41 *b. M.* 4 *Car. B. R. Croke*, *p.* 134. Sir *William Withipole*'s caſe, and the ſtatute of 11 *H.* 4. *cap.* 9. hereafter mentioned fortifies this, *de quo infra.*

And therefore if any of them be attainted in a conſpiracy, or *decies tantum*, or of perjury, or outlawd in any perſonal action, or attaint of felony, or in a *præmunire*, they are not to be indictors, becauſe in law they are not *probi & legales*. *Lamb. Juſtic.* 391.

Touching their *annuus cenſus*, I do not find any thing determined, but freeholders they ought to be. The ſtatute of 2 *H.* 5. *cap.* 3. that requires jurors that paſs upon the trial of a man's life, to have 40*s. per ann.* freehold, hath been the meaſure by which the freehold of grand jurymen hath been meaſured in precepts of ſummons of ſeſſions (†).

By the ſtatute of 11 *H.* 4. *cap. ultimo*, reciting, that inqueſts had been formerly returned of perſons outlawd, fled to ſanctuary for treaſon or felony, &c. enacts, "That no indictments be made by ſuch "perſons, but by inqueſt of loyal ſubjects returned by the ſheriffs or "bailiffs duly, without denomination of any perſon, but only by the "ſworn bailiffs and miniſters of the ſheriff; and if any indictment be "otherwiſe taken, it be void."

Upon this ſtatute it hath been reſolved in Sir *William Withipole*'s caſe, above cited. 1. That it extends to coroners inqueſts. 2. It is a good plea upon this ſtatute, that one of the indictors is outlawd in a perſonal action, as well as of felony, or that any of the jurors were impanneld at the denomination of any, contrary to this ſtatute.

By the ſtatute of 3 *H.* 8. *cap.* 12. it is enacted, "That the juſtices "of gaol-delivery, and juſtices of peace, whereof one of the *quorum*, "in open ſeſſions, may reform the pannels returned by the ſheriff, "(which be not at the ſuit of the parties), by putting to, and "taking out the names of the perſons returned, and ſhall [156*] "command the ſheriff to return the ſame accordingly, upon pain of "20*l.* and the king's pardon to be no bar to the proſecutor."

This act extends not only to pannels of grand inqueſts returned, but alſo to pannels of the petty jury, commonly called the jury of life and death, which may be reformed by the juſtices according to this act, and the ſheriff is bound to return the pannel ſo reformed.

(†) *Vide infra, p.* 272. *in notis.*

The

The grand inqueſt returned the firſt day of the ſeſſions, and ſworn, commonly ſerves the whole ſeſſions of the peace, *oyer* and *terminer*, or gaol delivery; yet the court may command another grand inqueſt to be returned and ſworn, which is done ordinarily upon two occaſions.

1. If before the end of the ſeſſions, the grand jury having brought *in* all their bills, are diſcharged by the court, and after that diſcharge, either ſome new felony, or other miſdemeanor is committed, and the party taken and brought into gaol; or if after the diſcharge of the grand inqueſt, ſome offender be taken and brought *in* during the ſeſſions. In the former caſe, there is a neceſſity to make a ſpecial record of the adjournment of the ſeſſions from day to day, becauſe otherwiſe the whole ſeſſions are in ſuppoſition of law only the firſt day, and therefore without the entry of ſuch adjournment, the offenſe and proceedings will be, in ſuppoſition of law, after the ſeſſions ended, and ſo the proceeding will be erroneous (*): this was the caſe of *Sampſon (h)*, who being arraigned and tried for a murder committed after the firſt day of the ſeſſions, and before the ſeſſions ended, for want of entry of an adjournment it was ruled erroneous. And the ſame is to be obſerved, if upon record it appears, that the grand inqueſt was returned after the firſt day of the ſeſſions, unleſs an adjournment be entered of record.

2. The ſecond ordinary inſtance of a new grand jury returned, is upon the ſtatute of 3 *H.* 7. *cap.* 1. namely, a grand inqueſt impannelled to inquire of the concealment of another grand inqueſt, upon which defaults preſented, the former grand inqueſt is to be amerced; and this, tho it mentions only an inqueſt thus to be taken by juſtices of peace, yet it extends to the king's bench, and hath been practiſed there accordingly in my knowledge, and poſſibly at the ſeſſions of *oyer* and *terminer* and gaol-delivery, tho that can rarely come in queſtion, becauſe the ſeſſions of the peace ordinarily accompanies thoſe commiſſions.

[157*]

And this is the proper and legal way of puniſhing the grand inqueſt, if they refuſe to preſent ſuch things as are within their charge, and for which they have probable evidence to make a preſentment; but of this more in the next chapter.

(*) *Supra*, p. 24. (h) *W. Jones*, 420.

See Index to 2 Hawk. P. C. tit. Indictors.

CHAP.

## CHAP. XXII.

*Concerning the* demeanor of the grand inqueſt, *in relation to their preſentments.*

THE coroners inqueſt may, and muſt hear evidence of all hands, if it be offered to them, and that upon oath, becauſe it is not ſo much an accuſation or an indictment, as an inquiſition or inqueſt of office, *quomodo* J. S. *ad mortem ſuam devenit*, tho it be alſo true, that the offender may be arraigned upon that preſentment.

But the grand inqueſt before juſtices of peace, gaol-delivery, or *oyer* and *terminer*, ought only to hear the evidence for the king; and in caſe there be *probable* evidence *(a)*, they ought to find the bill, becauſe it is but an accuſation, and the party is to be put upon his trial afterwards.

But if a bill of indictment for murder, or other capital offenſe be preſented againſt *A.* if upon the hearing the king's evidence, or upon their own knowledge of the incredibility of the witneſſes they are diſſatisfied, they may return the bill *ignoramus*.

If *A.* be killed by *B.* ſo that it doth *conſtare de perſonâ occiſi & occidentis*, and a bill of murder be preſented to them, [158] regularly they ought to find the bill for murder, and not for manſlaughter, or *ſe defendendo*, becauſe otherwiſe offenſes may be ſmothered without due trial; and when the party comes upon his trial, the whole fact will be examined before the court and the petty jury, and in many caſes it is a great diſadvantage to the party accuſed (*). For if a man kills *B.* in his own defence, or *per infortunium*, or poſſibly in executing the proceſs of law upon an aſſault made upon him, or in his own defenſe upon the highway, or in defenſe of his houſe againſt thoſe that come to rob him (in which three laſt caſes it is neither felony nor forfeiture, but upon not guilty pleaded he ought to be acquitted), yet if the grand inqueſt find an *ignoramus* upon the bill,

*(a)* This ſame doctrine is laid down by C. J. *Pemberton*, in the caſe of the earl of *Shaftſbury*, *State Tr. Vol.* III. *p.* 415. *Vide tamen* Sir *John Hawles* remarks on that caſe, *State Tr. Vol.* IV. *p.* 183. wherein he unanſwerably ſhews, that a grand-jury ought to have the ſame perſuaſion of the truth of the indictment, as a petit jury, or a coroner's inqueſt: *vide ſupra*, *p.* 61.

(*) Notwithſtanding this, according to lord *Coke*, 9 *Co.* 119. *a.* indictments, which concern the life of a man, ought to be framed as near the truth as may be.

or find the ſpecial matter, whereby the priſoner is diſmiſſed and diſcharged, he may nevertheleſs be indicted for murder ſeven years after.

But if the grand jury had found the bill for murder (yea or for manſlaughter), and the party pleading not guilty, the ſpecial matter is given in evidence, and the petty jury find the ſpecial matter; (or in the three laſt caſes find him not guilty, as they may) this acquittal upon this finding will be a good plea of *autrefoits acquit*, and he ſhall never be arraigned for it again.

If a bill be againſt *A.* for murder, and the grand inqueſt upon the evidence before them, or their own knowledge be ſatisfied that it was but *per infortunium*, or *ſe defendendo*, and accordingly return the bill ſpecially, the court may remand them to conſider better of it, or may hear the evidence at the bar, and accordingly direct the grand inqueſt; but I have known a judge blamed for ſetting a fine upon the grand inqueſt for ſuch a return, becauſe in truth it comes not up to felony.

But if a bill goes out againſt *B.* for murder, and it doth *conſtare de perſonâ occidentis*, may the grand inqueſt find the bill for manſlaughter, and *ignoramus* for the murder? and is the court bound to receive ſuch a return?

[159] In this caſe, of all hands it is agreed *(b)*, that the grand jury is to blame, becauſe they take upon them to anticipate the evidence that is to be given to the petit jury, and ſo determine matter of law, which belongs to the court to determine, and by this means many murders may eſcape under the diſguiſe of manſlaughter, and ſo eſcape with their clergy.

Some therefore have made it a practice to ſet a fine upon the grand jury in this caſe, and it hath proceeded ſo far, as to fine petit juries alſo in ſuch like caſes; whereof hereafter.

That which I think herein, and in other concealments of grand inqueſts, is as follows, *viz.*

1. That the court may receive ſuch a return from the grand inqueſt, and it is a matter of diſcretion, eſpecially, if upon inquiry from the

*(b)* This is far from being agreed of all hands, for ſuch an anticipation of the evidence by the grand jury is what they cannot avoid, they being bound by their oath as much as the petit jury, to *preſent the whole truth, and nothing but the truth*; nor do they in this caſe ſo properly determine matter of law as matter of fact; for whether murder or not depends upon a preconceived malice, which (tho it is to be preſumed, where no provocation appears,) is matter of fact, and proper for the conſideration of a jury; and tho judges have ſometimes fined jurors for not finding ſuch bills for murder, yet ſuch proceedings have been generally cenſured, as in the caſe of Sir *H. Wyndham*, and others, *P.* 19. *Car.* 2. who were fined by *Keeling*, C. J. for not finding a bill of murder, albeit they were ſatisfied the man died by the hand of the party indicted; but upon complaint in parliament, the chief juſtice was fain to ſubmit. 2 *Keb.* 180.

indictors

indictors or witneſſes, or upon view of their examinations it doth plainly appear, that the crime amounts to no more

2. That barely upon ſuch a return no fine can be ſet upon the grand inqueſt, unleſs the evidence to the grand inqueſt be given at the bar in the preſence of the court; for otherwiſe the court cannot underſtand, whether the grand inqueſt doth well or ill in ſuch caſe.

3. That if the evidence to the grand inqueſt be given at the bar upon an indictment in the king's bench, and the grand inqueſt will not find a bill according to the direction of that court; as for inſtance, will find a man guilty only *ſe defendendo*, or of manſlaughter, when it is murder, that court may ſet a fine upon the grand inqueſt, and ſo it hath been practiſed; for it is the higheſt court in *England* of ordinary juſtice, eſpecially in criminal cauſes.

4. That if the juſtices of *oyer* and *terminer*, or gaol-delivery having heard the evidence at the bar, the grand inqueſt will [160] not find according to their directions, the juſtices may bind them over by recognizance into the king's bench, and upon an information againſt them they may be fined.

5. That in ſuch a caſe juſtices of peace, *oyer* and *terminer*, or gaol-delivery may, according to the ſtatute of 3 *H.* 7. *cap.* 1. impanel another inqueſt to inquire of their concealments, and thereupon ſet fines upon them.

6. But in my opinion fines ſet upon grand inqueſts by juſtices of the peace, *oyer* and *terminer*, or gaol-delivery for concealments or non-preſentments in any other manner, are not warrantable by law; and tho the late practice hath been for ſuch juſtices to ſet fines arbitrarily, yea not only upon grand inqueſts, but alſo upon the petit jury in criminal cauſes, if they find not according to their directions, it weighs not much with me for theſe reaſons; 1. Becauſe I have ſeen arbitrary practice ſtill go from one thing to another, the fines ſet upon grand inqueſts began, then they ſet fines upon the petit juries for not finding according to the directions of the court; then afterwards the judges of *niſi prius* proceeded to fine jurors in civil cauſes, if they gave not a verdict according to direction even in points of fact; this was done by a judge of aſſize *(c)*, in *Oxfordſhire*, and the fine eſtreated; but I, by the advice of moſt of the judges of *England*, ſtaid proceſs upon that fine; the like was done by the ſame judge in a caſe of burglary, the fine was eſtreated into the *Exchequer*; but by like advice

*(c)* Juſtice *Hide* at *Oxford*, *Vaugh.* 135.

I ſtayed proceſs; and in the caſe of *Wagſtaff (d)*, and other jurors fined at the *Old-Bailey*, for giving a verdict contrary to direction, by the advice of all the judges of *England* (only one diſſenting), it was ruled to be againſt law: but of this hereafter *(e)*. 2. My ſecond reaſon is, becauſe the ſtatute of 3 *H.* 7. *cap.* 1. preſcribes a way for their fining, which would not have been, if they had been arbitrarily ſubject to a fine before. 3. It is of very ill conſequence, for the priviledge of an *Engliſhman* is, that his life ſhall not be drawn in danger without due preſentment or indictment, and this would be but a ſlender ſcreen or ſafe-guard, if every juſtice of peace, or commiſſioner of *oyer* and *terminer*, or gaol-delivery, may make the grand jury preſent what he pleaſes, or otherwiſe fine them; and there is no parity of reaſon or example between inferior judges and the court of king's bench, which is the ſupreme ordinary court of juſtice in ſuch caſes; and thus far concerning fining of grand inqueſts *(f)*.

[161]

They are ſworn to keep the king's counſel undiſcovered, the revealing or diſcloſing whereof was heretofore taken for felony, 27 *Aſſ.* 63. but that law is antiquated, it is now only fineable; if there be thirteen or more of the grand inqueſt, a preſentment by leſs than twelve ought not to be; but if there be twelve aſſenting, tho ſome of the reſt of their number diſſent, it is a good preſentment; for if twelve agree, it is not neceſſary for the reſt to agree. *Lamb. Juſtice* 400.

But in caſe of a trial by the petit jury, it can be by no more nor leſs than twelve, and all aſſenting to the verdict *(g)*, accordingly it was adjudged, *M.* 42 *E.* 3. *Rot.* 16. *Suff. Rex. (h)*, the judgment was reverſed, becauſe but eleven indictors.

But

*(d) Vaugh.* 153.

*(e) Cap* 42.

*(f)* The court of king's bench, it is true, may much more ſafely be truſted, than other inferior courts, but yet our author's arguments do ſufficiently evince, that no court whatever ought to have ſuch a power of making juries find what they pleaſe, nor has the law veſted ſuch a power in any court; for as to matter of fact, the jury are the ſole judges, and herein are to be guided entirely by their own judgments and conſciences; indeed in matters of law, the court is the proper judge, and the jury are not to find contrary to their direction; but even here they are not bound to follow the direction of the court, but if they cannot aſſent thereto, ought to find the fact ſpecially; indeed where the fact is agreed, if they will obſtinately find matter of law contrary to the direction of the court, there may be ſome reaſon why they ſhould be fined, See *Hood*'s caſe, *Kelyng* 50. but barely finding matter of fact againſt the direction of the court, is no ſufficient cauſe to fine a jury, *Buſhell*'s caſe, *Vaugh.* 153. and this diſtinction is founded on the antient maxim of the common law; *ad queſtionem juris non reſpondent juratores, ſed judices; ad queſtionem facti non reſpondent judices, ſed juratores.* Co. Lit. 155. 366. & *libros ibi.*

*(g)* See the inconveniencies hereof, *Pref.* to *State Tr. p.* 7.

*(h)* This caſe proves nothing as to the petit jury, it being an indictment on the coroner's inqueſt, as appears by the record, which is as follows: "*John Cobat* of *Ipſ-*"*wich*, was indicted by the coroner's in-"queſt, conſiſting only of eleven, quòd die "Sabbati

But if a preſentment be delivered into a court of ſeſſions, and received, no amercement lies, that it was not aſſented to by twelve, but otherwiſe it is in caſe of a preſentment by a leet, for the party diſtrained, *&c.* may aver that it was not preſented by twelve. 45 *E.* 3. 26. *b. B. Leet* 7.

The indictors are preſumed in law to be indifferent, unleſs the contrary appear; 1. Becauſe returned by the ſheriff. 2. Becauſe ſworn by the court to preſent, and therefore ſhall never be charged by writ of conſpiracy for any conſpiracy before their being ſworn, tho the party be acquit. 7 *H.* 4. 31. *b.* 19 *H.* 6. 19. *a.* But 21 *E.* 3. 17. by *R. Th.* it is a good replication to ſay, he procured himſelf to be returned of the grand inqueſt.

If a bill of indictment be for murder, and the grand jury return it *billa vera quoad* manſlaughter, *& ignoramus quoad* murder, the uſual courſe is in the preſence of the grand jury to ſtrike out *malitioſe & ex malitiâ ſuâ præcogitatâ* and *murderavit*, and leave in ſo much as makes the bill to be but bare manſlaughter, and ſo to receive it.

But the ſafeſt way is to deliver them a new bill for manſlaughter, and they to indorſe it generally *billa vera*; for the words of the indorſement make not the indictment, but only evidence the aſſent or diſſent of the grand inqueſt, it is the bill itſelf is the indictment when affirmed. And ſo in like caſes, where the bill contains two offenſes, as burglary and theft, forcible entry and detainer. *H.* 4 *Jac. B. R. Yelverton* 99. *Ford*'s caſe.

The grand jury are ſworn *ad inquirendum pro corpore comitatûs*, and therefore regularly they cannot enquire of a fact [163] done out of that country for which they are ſworn, unleſs ſpecially enabled by act of parliament, but only in ſome ſpecial caſes. *Mich.* 9 *Car. B. R. Bell*'s caſe.

" Sabbati prox' ante feſtum Sancti Petri ad " vincula anno regni regis, *E.* 3. poſt con- " queſtum triceſimo quinto inſultum fecit " *Johanni le Swon* ſervienti Prioris ſanctæ " Trinitat. *Gippewici* in ſuburbio libertat' " villæ prædictæ in quodam campo juxta " *Tromons' Hegg* & dictum *Johannem le* " *Swon* ibidem cum quadam armâ vocat' " *Sparth'* precii quatuor denar. verberavit " felon' de quâ quidem verberatione dictus " *Johannes le Swon* moriebatur, ſed lan- " guebat à dicto die Sabbati prox' ante feſ- " tum Sancti *Petri* ad vincula uſque ad diem " jovis tunc prox' ſequent.;" the which indictment was afterwards in *Mich'* term *anno* 42 of the ſame reign removed into the king's bench, " & continuato inde proceſſu " verſus præfat' *Johannem* uſque à die Paſ- " chæ in xv dies anno regni regis nunc " *Angliæ* quadrageſimo tertio, ad quem " diem coram domino regi apud *Weſtm'* " venit prædictus *Johannes Cobat* per man', " & viſo & diligenter examinato per cur' " indictamento prædicto, pro eo quod " compert, eſt in eodem, quod fuerunt niſi " undecim juratores tantùm in inquiſitione " prædictâ, ubi in qualibet inquiſitione de " jure fore deberent xii jurati, & ſic vide- " tur cur', quod indictamentum prædictum " minus ſufficiens eſt ad præfat' *Johannem* " *Cobat* ulterius inde ponere reſponſur'. " Ideo idem *Johannes Cobat* ad præſens eat " inde ſine die, ſalvo ſemper jure regis, " &c."

If a man had been ſtricken in the county of *A.* and had died in the county of *B.* the offender had no been indictable of murder, *&c.* in the county of *A.* becauſe the death was in the county of *B.* neither had he been indictable in the county of *B.* becauſe the ſtroke was given in the county of *A.* but by the ſtatute of 2 & 3 *E.* 6. *cap.* 24. he may be indicted in the county where the party died, tho the ſtroke were in another county; and alſo the offender ſhall be tried there, but an appeal may be brought in either county. 7 *Co. Rep.* 2. *a. Bulwer's* caſe.

So if *A.* had committed a felony in the county of *D.* and *B.* had been acceſſary *before* or *after* in the county of *C.* *B.* could not have been indicted as acceſſary in either county at common law, but by that ſtatute he is indictable, and ſhall be tried in the county where he ſo became acceſſary. *Stamf. P. C. Lib.* I. *cap.* 46.

So if a ſtroke were given *ſuper altum mare*, and the party came into the body of the county, and there died, this is *caſus oviiſſus*, and the party is neither indictable by the jury of the county where he died, nor before the admiral, by the ſtatute of 28 *H.* 8. *cap.* 15. *Co. P. C. cap.* 7. *p.* 48.

If *A.* robs *B.* in the county of *C.* and carries the goods into the county of *D.* *A.* cannot be indicted of robbery in the county of *D.* becauſe the robbery was in another county; but he may be indicted of larceny or theft in the county of *D.* becauſe it is theft wherever he carries the goods; the like law in an appeal, 4 *H.* 7. 5 *b.* 7. *Co. Rep.* 2. *a. Bulwer's* caſe.

But by the force of ſome acts of parliament, treaſons and felonies committed in one county may be indicted and tried in another county.

By the ſtatute of 33 *H.* 8. *cap.* 23. upon examination, as in that
[164] ſtatute is provided, treaſons, miſpriſions of treaſons, and murders committed in any place within the king's dominions, or without, may be enquired of, heard and determined, in any county where the king by his commiſſion ſhall appoint.

This ſtatute, at leaſt as to the trial of treaſons and miſpriſions, is repealed by the ſtatute of 1 & 2 *P.* & *M. cap.* 10. *Stamf. P. C. Lib.* 11. *cap.* 26. *fol.* 89, 90. *Co. P. C. cap.* 2. *p.* 27.

But it ſeems *that* ſtatute ſtands in force as to indictments and trials of murder, the circumſtances required by that ſtatute being obſerved.

By the ſtatute 35 *H.* 8. *cap.* 2. becauſe ſome doubt was conceived, whether foreign treaſons committed out of this realm might be enquired

of,

of, heard and determined within the realm, it is enacted, that ſuch offences ſhall be enquired of, heard and determined in the king's bench, or in ſuch counties where the king ſhall iſſue his commiſſion by the good men of the ſame county.

This ſtatute ſtands in force, not repealed by 1 & 2 *P. & M. cap.* 10. *Co. P. C. cap.* 2. *p.* 24.

By the ſtatute 27 *Eliz. cap.* 2. treaſons by prieſts or jeſuits coming into *England*, and felony for receiving them; and by the ſtatute 1 *Jac. cap.* 11. felony for taking a ſecond huſband or wife, the firſt living, are inquirable and determinable where the offender is apprehended; the like for felony in exportation of wools, by the ſtatute of 14 *Car.* 2. *cap.* 18. But yet it was held at common law, that treaſon in adhering to the king's enemies beyond the ſea, was inquirable and triable where the offender had lands, *vide Coke* ſuper *Littleton, Sect.* 440. *p.* 261. *b.* 5 *R.* 2. *Trial* 54. but this is now ſettled by the ſtatute of 35 *H.* 8. *cap.*2 *vide Co. P. C. cap.* 1. *p.* 11.

If *A.* by reaſon of tenure of lands in the county of *B.* be bound to repair a bridge in the county of *C.* if the bridge be in decay, he may be indicted in the county of *C.* that he is bound *ratione tenuræ* of lands in the county of *B.* to repair the bridge. 5 *H.* 7. 3. 3 *E.* 3. *Aſſiſe* 446.

4 Blackſ. Com. ch. 23. p. 303. Burn. tit. Jurors. Index to 2 Hawk P. C. tit. Jurors.

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## CHAP. XXIII. [165]

*Concerning the* forms of indictments in caſes capital, *and firſt touching the* form of the caption *returned upon a* certiorari.

IT will be a buſineſs of too much length, and beſides my intention to treat of all indictments in caſes of criminal, but I ſhall confine myſelf only to thoſe that are capital.

Touching the forms of indictments, there are two things conſiderable: 1. The caption of the indictment: 2. The indictment itſelf.

The caption of the indictment is no part of the indictment itſelf, but it is the ſtyle or preamble, or return that is made from an inferior court to a ſuperior, from whence a *certiorari* iſſues to remove; or when the whole record is made up in form, for whereas the record of

the indictment, as it ſtands upon the file in the court, wherein it is taken, is only thus: *Juratores pro domino rege ſuper ſacramentum ſuum præſentant*, when this comes to be returned upon a *certiorari* it is more full and explicite, *viz.* in this form:

Norff. *Ad generalem ſeſſionem pacis tent' apud* S. *in comit' prædicto 5 die Octobris anno regni, &c.* 25 *coram* A. B. C. D. *& ſociis ſuis juſticiariis domini regis ad pacem dicti domini regis in comit' prædict' conſervand', necnon ad divers' felonias tranſgreſſ' & alia malefacta in eodem comitat' audiend' & terminand' aſſignatis, per ſacrament'* E. F. G. H. *&c. proborum & legalium hominum comit' prædict' jurat' & onerat' ad inquirend' pro dicto domino rege & pro corpore comit' prædict' exiſtit præſentatum.*

[166] 1 Firſt, The name of the county muſt be in the margin of the record, or repeated in the body of the caption.

2. The court where the preſentment is made, muſt be expreſſed, *viz. ad generalem ſeſſionem pacis, &c.* or *ad generalem goelæ regis deliberationem, &c.*

3. It muſt appear where the ſeſſion was held, and that the place where it was held is within the extent of the commiſſion, and therefore if *Dorſet* be in the margin, and the caption be *ad generalem ſeſſionem pacis tent' apud* S. and ſays not *in comitat' prædicto*, it is nought, *H.* 42 *Eliz. B. R. Ludlow*'s caſe, *Croke, n.* 10. *p.* 738. *P.* 40. *Eliz. B. R. Croke, n.* 4. *p.* 606. *Child*'s caſe; ſo if weſt-riding *in comit' Eborum* be in the margin, and caption be *apud* S. *in comit.' prædicto*, it ſhall be quaſhed, becauſe it doth not ſay *apud* S. *in* weſt-riding *in comitatu prædict T.* 5 *Jac. B. R.* and *P.* 9. *Jac. B. R. Thorny*'s caſe, *Croke, n.* 6. *p.* 276.

4. The juſtices names, *H.* 42 *Eliz. B. R. Ludlow*'s caſe.

But it is not neceſſary to name all the juſtices by name, but the reſt may be ſupplied by the words *(& ſociis ſuis, &c.)* But ſo many are fit to be named as are enabled by their commiſſion to hold a ſeſſion, and the return of the caption is ſuppoſed to agree with the title of their ſeſſions.

5. The title of their authority, as *juſtic' ad gaolem domini regis com' prædict' deliberand'*.

And *note*, that if there be a ſeſſion by three commiſſions, as of gaol-delivery, *oyer* and *terminer*, and the peace, if it be returned at a ſeſſion

ſeſſion holden before them, and the record be made up, as upon all three commiſſions, if they have juriſdiction to take the indictment but by one of thoſe, it is good, tho not enabled to take it by the other. 9 *H.* 7. 9. *a.*

*Tent' coram juſticiariis ad pacem*, without ſaying *necnon ad divers' felonias, &c. audiend' & terminand' aſſignatis*, is not good to remove an indictment, becauſe tho that clauſe be uſually added to all commiſſions of the peace, yet there are not thereby juſtices of *oyer* and *terminer*, and that clauſe ought to be added to their return, becauſe without that clauſe they cannot proceed by indictment. 22 *E.* 4. 12. *b.* 2 *R.* 3. 9. *a. b.*

And altho in all commiſſions of *oyer* and *terminer*, gaol-delivery, and of the peace, there be ſome that are of the [167] *quorum*, without which there can be no ſeſſion held, yet in the caption there need not be any mention, whether any of them, or which of them are of the *quorum*, but generally as before, for it is ſufficient, if *de facto* the ſeſſion be held before him or them that are of the *quorum*, tho not ſo mentiond in the return, and ſo is the uſual courſe.

But it ſeems, that if an act of parliament doth expreſly limit, that ſuch or ſuch an offenſe ſhall be heard and determined before two or more juſtices of the peace, *&c.* whereof one to be of the *quorum*, the caption of ſuch an indictment of ſuch an offenſe ought to mention, whereof *A. &c.* is of the *quorum*, as is uſed in the return of orders made by two juſtices touching baſtard children upon the ſtatute of 18 *Eliz. cap.* 3. becauſe the act of parliament preciſely limits one to be of the *quorum*, and therefore muſt be purſued.

6. It muſt return, that the indictment was made *per ſacramentum.*

7. It muſt name the jurors that preſented the offenſe, and therefore a return of an indictment or preſentment *per ſacramentum* A. B. C. & D. & *aliorum* is not good, for it may be the preſentment was by a leſs number than twelve, in which caſe it is not good. *H.* 41 *Eliz. B. R. Croke, n.* 16. *Clyncard's* caſe, *p.* 654. and it ſeems to me, that all the names of the jurors ought to be returned; for the party indicted may have an exception to ſome or one of them, as that he is outlawed, in which caſe the indictment may be quaſhed by plea, tho there be twelve beſides without exception; for poſſibly that one, who is not *legalis homo*, may influence all the reſt, and ſo vitiate the whole indictment.

8. They

8. They muſt be returned to be *probi & legales homines*, and *de comitatú prædicto*, and this holds as well in the caſe of the coroner's inqueſt, as of other indictments or preſentments. *P.* 20 *Jac. B. R. Croke* 2. *Oily*'s caſe, *p.* 635.

9. It ſeems requiſite alſo to add this clauſe, *onerati & jurati ad inquirendum pro domino rege & pro corpore comit' prædict'*; and if it be a preſentment by the grand jury of a liberty, *ad inquirend' pro domino rege & pro libertate de* S. *vel rapâ de* S.

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10. If it concludes *qui dicunt*, and ſays not *ſuper ſacrament'*, &c. or *præſentatum exiſtit*, and ſays not *per ſacramentum*, &c. *præſentatum exiſtit*, it ſhall be quaſhed, for their preſentment muſt be upon oath, and ſo returned; ſo ruled *T.* 23 *Car.* 1. *B. R.*

And thus far for the caption of the indictment, where, *note* 1. That if the caption be faulty in the form, yet the ſame term it may be amended by the clerk of the aſſiſes, or the peace, but not in another term.

2. But in another term, the clerk that returns it ſhall be fined for his informal return.

## CHAP. XXIV.

*Concerning the* body of the indictment *in caſes capital, and the* ſeveral parts *thereof, and the* forms *requiſite therein.*

THIS is a large and uncertain title, and hard to be reduced to any certain orders; 1. Becauſe the parts of an indictment are many. 2. The ſtrictneſs required in indictments is great, becauſe life is in queſtion. 3. Therefore very nice and ſlender exceptions have been of latter ages allowd, and they have been with too much facility quaſhed and reverſed. 4. The circumſtances of facts and crimes are very various.

Yet I ſhall endeavour to reduce this title to as much certainty, and as good a method as I can, confining myſelf to capital cauſes, tho there be many things that will ariſe equally applicable to cauſes of an inferior nature.

An indictment is nothing elſe but a plain, brief, and certain narrative of an offenſe committed by any perſon, and

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of

of thoſe neceſſary circumſtances, that concur to aſcertain the fact and its nature; and therefore I ſhall conſider 1. Some generals, that concern indictments in general. 2. I ſhall conſider the ſeveral parts of indictments in their order.

Among theſe generals theſe will come to be conſiderd, that follow.

1. Regularly, every indictment ought to be in *Latin*, as all pleadings in the courts of law ought to be, and it is of excellent uſe, becauſe it being a fixed, regular language, it is not capable of ſo many changes and alterations, as happen in vulgar languages. *(a)*

If there be a proper *Latin* word for any offenſe or thing containd in an indictment, it may not be ſupplied with general words, and an *Anglicè*.

Therefore an indictment, *quòd exercuit quaſdam diabolicis artes, Anglicè* witchcraft, was quaſhed, becauſe there is a proper *Latin* word for it; *viz. Incantatio. M.* 2 *Car. B.* Dr. *Lamb*'s caſe. *(b)*

Regularly, falſe *Latin* doth not vitiate an indictment, if yet the indictment be reaſonably intelligible, 5 *Co. Rep.* 121. *a. Long*'s caſe, *M.* 30 & 31 *Eliz. Croke, n.* 3. *B. R. Brickett*'s caſe, *(c)*, as *præfato reginæ*, where it ſhould be *præfatæ*.

But if the words be words of art, and by omiſſion or miſplacing of letters become inſignificant, they vitiate the indictment, as *burgariter* for *burglariter*, *feloniter* for *felonicè*, *murdredavit* for *murdravit*; but *burgulariter* hath been held good, 4 *Co. Rep.* 39. *b. Brook's* caſe, *ibid.* 41. *b. Haydon*'s caſe, 5 *Co. Rep.* 121. *a. Long*'s caſe. *H.* 45 *Eliz. B. R. Croke, n.* 15. *Ryle*'s caſe. *(d)*

So if it make the indictment inſenſible or uncertain, as if *A.* and *B.* be indicted for ſtealing, *felonicè cepit & aſportavit*, [170] where it ſhould be *ceperunt*, it ſhall be quaſhed, *P.* 42 *Eliz. B R. Lane*'s caſe *(e)*; ſo in an indictment of murder, the ſtroke laid *in ſiniſtro bracio*, where it ought to be *brachio*, for it appears not where the wound was, the words being inſenſible. *T.* 31 *Eliz. B. R. Webſter*'s caſe. *(f)*

*(a)* This is now alterd by 4 *Geo.* 2. *cap.* 26. 6 *Geo.* 2. *cap.* 6. which requires all indictments, &c. to be in the *Engliſh* tongue; for notwithſtanding the excellency of the uſe here mentiond by our author, it was thought to be of much greater uſe and importance, that they ſhould be in a language capable of being known and underſtood by the parties concerned, whoſe lives and liberties, were to be affected thereby.

*(b) Noy* 85. *Latch.* 156. *W. Jones* 143.

*(c) Cro. Eliz.* 108.

*(d) Cro. Eliz.* 920.

*(e) Cro. Eliz.* 754.

*(f)* By the name of *Goſlen*'s caſe; *Cro. Eliz.* 137.

Ab-

Abbreviations, that are uſual, are allowable in indictments, as well as in other pleadings, and ſhall be conſtrued to the beſt advantage for the maintaining of the indictment, as if an indictment be maintainable upon one ſtatute or more, a concluſion *contra formam ſtatut. in hujuſmodi caſu edit. & proviſ.* ſhall be conſtrued ſingularly or plurally, as makes beſt for the maintenance of the indictment. *(g)*

Figures to expreſs numbers are not allowable in indictments, tho ſometimes literal numbers be allowable in returns, but in indictments the numbers, whether cardinal or ordinal, muſt be expreſſed in *Latin.*

II. An indictment grounded upon an offenſe made by act of parliament muſt by expreſs words bring the offenſe within the ſubſtantial deſcription made in the act of parliament, and thoſe circumſtances mentiond in the ſtatute to make up the offenſe ſhall not be ſupplied by the general concluſion *contra formam ſtatuti.*

And ſo it is, if an act of parliament ouſt clergy in certain caſes, as murder *ex malitiâ præcogitatâ*, robbery in or near the highway, ſtabbing one not having ſtruck firſt, nor having a weapon drawn, tho the offenſes themſelves were at common law, yet becauſe at common law within clergy, they ſhall not be ouſted of clergy, tho convicted, unleſs theſe circumſtances, as *ex malitiâ præcogitatâ*, or *prope altam viam*, &c. be expreſſed in the indictment.

But where an offenſe is made felony, or otherwiſe puniſhable by act of parliament, tho the indictment muſt take in the circumſtances, which in the body of the act make up the offenſe, yet if by a proviſo in the ſame ſtatute, or by any ſubſequent ſtatute ſome caſes [171] or circumſtances are exempted out of the act, the indictment need not mention and qualify the offenſe, ſo as to exempt it out of the proviſo, but the party ſhall have advantage of the proviſo by pleading *not guilty*, and in the ſame manner ſhall have advantage of the ſubſequent ſtatute to excuſe him by virtue of the ſtatute of 21 *Jac. cap.* 4.

If a ſtatute prohibit any act to be done, and by a ſubſtantive clauſe gives a recovery by action of debt, bill, plaint, or information, but mentions not indictment, the party may be indicted upon the prohibitory clauſe, and thereupon fined, but not to recover the penalty, as upon the ſtatute of 3 *Jac. cap.* 5. prohibiting recuſants to baptize their children by a popiſh prieſt. *H.* 7 *Car. B. R. per Cur'*, but

*(g)* This is alſo alterd by 4 *Geo.* 2. *cap.* 26. 6 *Geo.* 2. *cap.* 6. which prohibits all abbreviations in indictments, &c.

then

then it ſeems the fine ought not to exceed the penalty, *P.* 22 *Car. B. R. College of Phyſicians, vide tamen M.* 20 *Jac. B. R. Croke, n.* 4. *Caſtle*'s caſe *contra. (h)*

But if the act be not prohibitory, but only that if any perſon ſhall do ſuch a thing, he ſhall forfeit 5*l.* to be recoverd by action of debt, bill, plaint, or information, he cannot be indicted for it, but the proceeding muſt be by action, bill, plaint, or information. *P.* 6 *Car. B. R. Day*'s caſe.

If a man be indicted for an offenſe, which was at common law, and concludes *contra formam ſtatuti*, but in truth it is not brought by the indictment within the ſtatute, it ſhall be quaſhed, and the party ſhall not be put to anſwer it as an offenſe at common law.

As if a man be indicted for drawing his dagger in the church upon *J. S. contra formam ſtatuti, viz.* 5 *E.* 6. *cap.* 4. but omits theſe words *with an intent to ſtrike*, the indictment ſhall be quaſhed, and the party not put to anſwer the aſſault at common law. *P.* 33 *Eliz. B. R. Croke, n.* 23. *Penhallo*'s caſe. *(i)*

So if a man be indicted for a riotous and forceable entry *contra formam ſtatuti, viz.* 8 *H.* 6. *cap.* 9. and the ſtatute is miſrecited, he ſhall not be put to anſwer the offenſe at common law, but the indictment ſhall be quaſhed. *M.* 35 & 36 *Eliz. B. R.* [172] *Croke, n.* 10. *Hall* and *Gaven (k)*, *M.* 41 *Eliz. B. R. Croke, n.* 10. *Eden*'s caſe *(l)* yet *vide M.* 10. *Car. Holme*'s caſe. *(m)* A man indicted for felonious burning of a houſe, upon *not guilty* pleaded a ſpecial verdict was found, it was adjudged no felony, as the caſe was found, yet upon the ſame indictment he was adjudged to the pillory, and fined 500*l.* and bound to his good behaviour, but *quære* of that caſe, for it ſeems unreaſonable, becauſe being tried for felony, he hath not thoſe advantages for his defenſe, as if he were indicted only for treſpaſs. *(n) M.* 10 *Car. B. R. Croke, n.* 3. *vid.* 2 *H.* 7. 10. *b.*

If a ſtatute be particular, it muſt be recited in the indictment, and proved by an exemplified copy upon the trial.

But if a man be indicted *quòd furatus eſt*, and ſays not *felonicè*, this indictment imports but a treſpaſs, and the offender may be put to anſwer it as a treſpaſs. 2 *H.* 7. 10. *b.* 18 *E.* 4. 10. *b.*

(h) Cro. Eliz. 644.
(i) Cro. Eliz. 732.
(k) Cro. Eliz. 304.
(l) Cro. Eliz. 547.
(m) Cro. Car. 376.
(n) For inſtance, he could not have the aſſiſtance of counſel.

And

And ſo it ſeems, if a man be indicted at a leet, *quòd felonicè rapuit* ſuch a woman, and this indictment is removed into the king's bench; becauſe the leet hath no juriſdiction to take an indictment of rape as a felony, he ſhall not be put to anſwer it as a felony, but ſhall be fined as for a treſpaſs, becauſe as a treſpaſs the leet may enquire of it. 6 *H.* 7. 5. *a.*

If it be a general ſtatute, it need not be recited, but it is ſufficient to conclude *contra formam ſtatuti in hujuſmodi caſu edit' & provis'*, for the court ought to take notice of it, and all penal ſtatutes, that induce a forfeiture to the king, or make a felony or treaſon are general ſtatutes, becauſe it concerns the king; but if a general ſtatute be recited in an indictment, and be miſrecited in a point material, and conclude *contra formam ſtatuti prædicti*, it is fatal, and the indictment ſhall be quaſhed, but it ſeems, that if it conclude generally
[173] *contra formam ſtatuti in hujuſmodi caſu edit' & provis'*, it is good, for the court takes notice of the true ſtatute, and will reject the miſrecital as ſurpluſage. *M.* 7 *Car. B. R. Croke, n.* 14. *Barn*'s caſe *(o)* in maintenance, and *M.* 8 *Car. B. R. per Jones ſuper ſtat. de cottages (p).*

1. If an act of parliament making a felony or other offenſe be but temporary, and made perpetual by another ſtatute, the indictment concluding *contra formam ſtatuti* is good.

2. If the former ſtatute be diſcontinued, and revived by another ſtatute, the beſt way is to conclude *contra formam ſtatutorum*, *M.* 31 & 32 *Eliz. B. R. Mill*'s caſe, tho there is good opinion, that it is good enough to conclude *contra formam* of the ſtatute, as in caſe of the ſtatute of 5 *E.* 6. of ingroſſing, 37 *H.* 8. for uſury, and 5 *Eliz.* for perjury, which were diſcontinued and revived, yet the indictments good concluding *contra formam* of the firſt ſtatute. *T.* 9 *Jac. Rot.* 124. *C. B. Weſtwood*'s caſe.

3. If one ſtatute be relative to another, as where the former makes the offenſe, the latter adds the penalty, as the ſtatutes of 1 and 23 *Eliz.* the indictment ought to conclude *contra formam ſtatutorum. P.* 42 *Eliz. B. R. Croke, n.* 6. *Dingly* and *Moore (q).*

III. Touching the joining of perſons and offenſes in one indictment.

*(o) Cro. Car.* 239. *(p)* 31 *Eliz. cap.* 7. *(q) Cro. El.* 75.

If there be one offender and ſeveral capital offenſes committed by him, they may be all contained in one indictment, as burglary, and larciny: Larcinies committed of ſeveral things, tho at ſeveral times, and from ſeveral perſons, may be joined in one indictment.

If there be ſeveral offenders, that commit the ſame offenſe, tho in law they are ſeveral offenſes in relation to the ſeveral offenders, 21 *E.* 4. yet they may be joined in one indictment, as if ſeveral commit a robbery, or burglary, or murder.

And ſo it is, if the offenſes are of ſeveral degrees, but dependent one upon another, as the principal in the firſt degree, and the principal in the ſecond degree, *viz. preſent*, *aiding*, and *abetting* the principal, and acceſſary before or after.

[174] IV. Touching the joining of ſeveral offenſes of the ſame nature, but diſtinctly committed by ſeveral offenders, ſome have been ruled inſufficient, as an indictment of ſeveral perſons, *quòd non eſcoururunt foſſata ſeparalia ante ſeparalia ſua pomaria*, quaſhed in 23 *Car.* 1. *B. R.* ſo of ſeveral officers, *quòd colore ſeparalium officior' ſuorum ſeparalitèr extorſivè ceperunt, &c. M.* 33 & 34 *Eliz. B. R. Lake*'s caſe in *Hughe*'s *Rep.* and ſo if two are indicted for uſing a trade not being bound apprentice, it is not good. *P.* 16 *Car.* 1. *B. R. Brooke*'s caſe *(r)*.

But yet in 21 *T.* 21 *Jac. B. R. A. B. C.* and *D.* were indicted for erecting four ſeveral inns *ad commune nocumentum*, it was ruled, that for ſeveral offenſes of the ſame nature ſeveral perſons may be indicted in the ſame indictment, but then it muſt be laid *ſeparalitèr exercerunt*, and for want of that word *(ſeparalitèr)* the indictment was quaſhed.

And it is common experience at this day, that twenty perſons may be indicted for keeping diſorderly houſes, or baudy-houſes, and they are daily convict upon ſuch indictments, for the word *ſeparalitèr* makes them ſeveral indictments.

*(r)* 2 *R. A.* 78. *pl.* 6.

CHAP.